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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-834

ROY HUBBARD, ET AL.,
Petitioners,

vs.

JIM AMMERMAN, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

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No. .....

ROY HUBBARD, ET AL.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO SAID HONORABLE COURT:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 6, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is set forth in a separate appendix, along with the order denying rehearing, and the opinion of the Texarkana Court of Civil Appeals of the State of Texas in a companion case.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 6, 1972, and the order denying rehearing was entered on October 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS RAISED

1. Did electors whose votes had been illegally diluted through State protected ballot box stuffing have a justiciable interest in an action under the Civil Rights Acts (42 U.S.C., §1983 and 28 U.S.C., §1343, et seq.), and the Fourteenth Amendment? (pp. 10-12).

2. Under the circumstances set out in Question 1, was there a substantial Federal question presented by an action to protect the stated rights of the electors so as to give the United States District Court jurisdiction of the subject matter of the action? (p. 13).

3. Assuming that Intervenor Collins was an indispensable party to the action, was his appearance as a Class Plaintiff sufficient to meet the requirement, and if not, did the permission for him to intervene as a party, and for the Plaintiffs to amend and adopt his plea before the trial on the merits cure the supposed defect in alleging jurisdiction in the original complaint? (pp. 14-16).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV:

> Section 1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

R.S., §1979, 42 U.S.C., §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

71 Statute 637, 28 U.S.C., §1343:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"
>
> * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat. 637."

STATEMENT

This is a class action brought on behalf of electors in a Democratic primary to prevent infringement on their rights of franchise, due process and equal protection of the law by means of State practice. The Defendants are the members of the Harrison County Democratic Executive Committee, the Clerks of the State District and Appellate Courts, the State District Judge, and the Election Officials of the County. Jurisdiction was primarily based upon a violation of the Fourteenth Amendment, 42 U.S.C., §1983, and 28 U.S.C., §1343.

Under the "mootness doctrine" of Texas, where a contestant has been judicially pronounced to be the winner of a primary election by a State Trial Judge, the name of the contestee must yet be placed on the general election ballot, unless an appeal from the judgment may be processed and a retrial, where ordered, finally determined before the elapse of the time required for preparing ballots for the general election. The number of procedural delays allowed made it certain that no primary election contest could ever be finally determined before the date for preparing ballots in Texas (44 Tex. Law Rev. 322, App. 71-75).

The District Court herein concluded that the practice was violative of the due process and equal protection clauses of the Constitution (App. 19, 22). This conclusion

was not questioned in the briefs nor in the opinion of the Appeals Court. Pursuant to it, the District Court entered a preliminary injunction on September 29, 1970, restraining the holding of a general election until the Texas Courts could finally dispose of a pending election contest of the Democratic primary (App. 68-70). The order was issued under the doctrine of abstention (F.F. on merits, ¶24 App. 16-17), with the Court retaining jurisdiction pending the outcome of the State election contest.

An October 12, 1970 final judgment of the State Trial Court in the contest case eliminated ballots stuffed for Defendant Ammerman and decreed Intervenor Collins to be the winner of the nomination (App. 25-26). His name was ordered placed on the ballot for the general election. On October 13, 1970, the Plaintiffs moved the Federal District Court to lift the preliminary injunction, and order the name of Collins placed on the general election ballot in accordance with this judgment. Counsel for Ammerman opposed the motion, and in answer to a question of the Court on the hearing as to what power the Court would have if the Texas Appeals Court ignored the restraining order and yet held the case moot, replied:

> "I don't believe they would do that. I have no guarantee, but if they did, this Court still has control. You would have jurisdiction over when the election would be held and could determine then whose name should go on." (Hearing on Mot. to Dissolve Prel. Inj., pp. 10-13, F.F. on Merits, ¶27, App. 17).

Ammerman did perfect an appeal, and on March 9, 1971, the Texas Court of Civil Appeals ordered the State Trial Judgment set aside, and the election contest case dismissed because it concluded that the trial and appellate courts of Texas had been ousted of jurisdiction by the issuance of the preliminary injunction (App. 26-37). The

Texarkana Court was the Court of last resort on the question under the Texas practice.

The Federal District Court proceeded to try the case on its merits, and on May 27, 1971 entered a judgment permanently enjoining the State Trial Court from invalidating its judgment, or dismissing the State action (App. 76-80). It ordered the holding of a special general election. Concluding that Ammerman was collaterally estopped from questioning the determination of the issues in the State election contest (App. 22-23), the Court ordered the name of Collins alone to be placed on the ballot as the nominee of the Democratic party for the office in question, County Judge of Harrison County, Texas (App. 78).

THE OPINION OF THE APPEALS COURT

In essence, the Appeals Court held that the Plaintiffs had no justiciable interest in the action without the joinder of Collins as a Plaintiff, and that no substantial Federal question was presented to give the Court jurisdiction of the subject matter.

It erroneously held that the State Trial Court had eliminated the ballots illegally stuffed, and that consequently there could be no question of dilution. The State Court did find the ballots spurious on the first trial of the contest (App. 14), and entered a judgment calling for a new primary election. When the Democratic Executive Committee refused to obey the judgment, and Collins was refused mandamus to procure the election (App. 14-15), Ammerman attempted to rehabilitate the spurious votes on two appeals (App. 27-29). The question of "dilution" thus remained in the case. Indeed, it is the cause of Ammerman continuing to serve as County Judge when he has neither been legally nominated nor elected to the position.

For, without the dilution, he would never have been the apparent winner of the primary in the first place.

The inevitable result of the March 9, 1971 opinion of the Texas Appeals Court, and the September 6, 1972 opinion of the Circuit Court is the closing of both State and Federal Courts to relief for electors whose constitutional rights have been violated. Each Appellate Court has asserted that jurisdiction over the subject matter of this case lay exclusively in the other forum. Despite the fact that the State District Judge and the Federal District Judge in each case concluded that fraudulent ballots were cast, and that the candidate receiving the majority of the legal ballots was not certified as the nominee, the combined decisions of the Appellate Courts rewarded the fraud by denying relief in either court. The principles announced make it totally impossible for aggrieved voters and candidates to successfully challenge a fraudulent election in either State or Federal jurisdictions.

This is true, because a voter would be denied standing in a State Court under the Texas decisions, and would be denied standing in a Federal suit under the Appeals Court decision, unless the candidate was a party. Assuming the candidate desired to join in a Federal suit, the State procedure for contesting the election would require Federal Court abstention, even though the "mootness doctrine", as demonstrated in this case, makes the remedy totally illusory.*

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*After the date of the opinion below, the Appellants in Cause No. 72-3307, *U. S.* v. *Bishop, et al.*, pending on appeal in the Fifth Circuit, filed a motion to dismiss because successful candidates were not made parties in the district court. The suit sought declaratory and injunctive relief, including the setting aside of an election under the Voters Rights Act, because of an alleged selective and discriminatory purge of voters by a voting registrar. Thus, we see the likely impediment to suits under that Act, because of the erroneous decision in this case. Theretofore, to the writer's knowledge, winning candidates had not been held necessary parties to such suits.

The only way to insure that a forum is open for relief from election fraud in the future, not only in this instance, but for all future elections in the State of Texas, will be for this Court to exercise its jurisdiction to review the present case.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Appeals Court and the Texas Appellate Courts holding that the Trial Court in neither of the jurisdictions may entertain a suit for the protection of a voter's civil rights under 42 U.S.C., §1983 is in conflict with the plain wording of the provision and the decisions of this Court in *McNeese* v. *Board of Education*, 373 U.S. 668, 671, 10 L. Ed. 2d 622, 625, and *Mitchum* v. *Foster*, 40 L.W. 4737, 32 L. Ed. 2d 705, 92 S. Ct. ____.

2. The Appeals Court holding that qualified electors have no standing to maintain a suit for injunctive relief against deprivation of their Federal constitutional rights through the conduct of primary elections and state practice thereunder, without the joinder of a candidate, is in conflict with decisions of the same Court earlier rendered, such as *Sanders* v. *Gray*, (3 judge court, 1962) 203 F. Supp. 158, and is in conflict with prior decisions of this Court, as exemplified by the opinion in *Gray* v. *Sanders*, (1963) 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801.

3. The holding of the Appeals Court that the Trial Court lacked necessary jurisdiction to prevent infringement on constitutional rights by temporarily restraining the holding of a general election, and thereafter ordering a new election to protect such rights is in conflict with

the earlier decisions of the same Court such as *Hamer* v. *Campbell*, (Mar. 1966, 358 F.2d 215, 221, cert. den. 385 U.S. 851, 16 L. Ed. 2d 612) and with the decision of this Court in *Hadnott* v. *Amos*, (1969) 394 U.S. 358, 22 L. Ed. 2d 336, 89 S. Ct. 1101.

4. The Texas Courts deny a voter standing in an election contest, and deny a candidate relief under the mootness doctrine. Hence, the Appeals Court decision denying a voter standing in Federal Court without the joinder of a candidate is tantamount to a holding forever denying a forum for the protection of constitutional rights to vote.

ARGUMENT

The Denial of a Forum for Protecting Civil Rights

This Court has often held that a voter in a state election is entitled to the constitutional guarantees of the Fourteenth Amendment, and that no right is more precious in a free country than that of having a voice in the election of officials (*Wesberry* v. *Sanders*, 376 U.S. 1, 5, 17, 11 L. Ed. 2d 481, 485, 492). In *McNeese* v. *Board of Education* (373 U.S. 668, 672, 10 L. Ed. 2d 622, 625), the Civil Rights Act (42 U.S.C., §1983) was thus characterized:

> "The purposes (of the Act) were several-fold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' (id. 365 US 174), and to provide a remedy in the federal courts supplementary to any remedy any State might have. Id. 365 US 180-183."

Later, in *Mitchum* v. *Foster* (40 L.W. 4737, 32 L. Ed. 2d 705, 92 S. Ct. .....), this Court spoke of remarks in the debate surrounding the passage of Section 1983 to the effect that "(State) judges, having ears to hear, hear not", and went on to hold that:

> "The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial'." (32 L. Ed. 2d at 705).

The Texas Court's "mootness doctrine" presents a perfect example of judges who "hear not". Through the use of delay that makes impossible the assertion of civil rights, the Texas Courts have destroyed them. If the opinion of the Federal Appeals Court in this case remains unchanged, the Federal Courts have likewise been closed in contravention of the authorities discussed.

The Plaintiffs Had a Justiciable Interest

This case is not an election contest. No party to the action ever contended it was an election contest. In the motion to dismiss, relied upon by the Appeals Court as reason for dismissal (App. 45, 60-62), the point that the suit was an election contest was not raised. In the briefs of the Defendants in both the Trial and Appellate Courts the central, if not only, contention was that the Trial Court was inhibited from giving relief because of the Anti-Injunction Statute.[1]

Following the decision on June 19, 1972 in *Mitchum* v. *Foster*, (40 L.W. 4737, 32 L. Ed. 2d 705, 92 S. Ct. .....) the Appeals Court called upon the parties for briefs on the subject of the effect that the decision would have on the present case. Thereafter, and seven months after submission, the Court, *sua sponte*, concluded that the Trial Court litigated an election contest in granting the preliminary injunction, and that since Collins, one of the candidates, was not a party, the Court lacked jurisdiction (App. 60-62, 65-67). Briefs were not called for. Had they been, we would have called the Court's attention to this language from *Gray* v. *Main*, (U.S. District Ct. M. D., Ala., N.D., March 28, 1968) 309 F. Supp. 207, 210:

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1. 28 U.S.C., §2283: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."

"The defendants also argued that this court did not have jurisdiction based upon 28 U.S.C., §1344. As the court pointed out in the order of September 7, 1966, this suit was not an action to recover possession of any office as contemplated by Section 1344, but rather it is an action to redress certain alleged deprivations under color of state law of the Negroes' right to vote with jurisdiction specifically conferred by 28 U.S.C. Sec. 1343(3) and (4). It was also noted that although the relief could possibly involve ordering a new election, the determining factor is not whether one candidate or another should have been elected but whether the holding of a new election is an appropriate means to remedy the discrimination of which the plaintiffs complain." (309 F. Supp. 210).

True, on trial upon the merits events had overtaken the case, and to accord complete relief the Trial Court found Ammerman collaterally estopped to deny that Collins had won the nomination, and ordered the name of the latter to be put on the ballot. Collins was before the Court as an intervenor at this time, and, indeed, was before the Court as a class plaintiff when the original complaint was filed.

In this setting, the inevitable result of the Appeals Court opinion was to deny the Plaintiffs-Voters standing in Court in contravention of the pronouncement of this Court in *Gray* v. *Sanders*, (372 U.S. 368, 375, 9 L. Ed. 2d 821, 827) as follows:

"We also agree that appellee, like any person whose right to vote is impaired (Smith v. Allwright) [US] supra (321 U.S. 649, 88 L. Ed. 987); Baker v. Carr, supra (369 U.S. pp. 204-208), has standing to sue." (An accompanying footnote shows the right to have been recognized 250 years ago).

There Was a Substantial Federal Question

The opinion below says that no substantial Federal question existed, because the spurious votes stuffed in the ballot box had been eliminated by the State Court judgment that had ordered the holding of a new election, among other reasons, because of the wholesale fraud involved in the ballot box stuffing (App. 64). The opinion further divulges that this identical judgment had been stayed at the time of the filing of the complaint herein, by appeal to the Texas Appellate Court (App. 15, 43). Ammerman was seeking to rehabilitate the spurious votes on this appeal, as he did on the last; so it is far from accurate to say that the spurious votes could not have diluted the ballots of the Plaintiffs at the time of the preliminary injunction. As a matter of fact, a week after the issuance of the preliminary injunction, the Texas Appellate Court reversed the judgment calling for a new election, and remanded the case for retrial to determine which ballots were illegal and who received the majority of the votes cast (App. 17, 46-47).

In these circumstances, it cannot be said that the claim of the Plaintiff was "so attenuated and unsubstantial as to be absolutely devoid of merit", as required for dismissal for want of jurisdiction of the subject matter (*Baker* v. *Carr*, 369 U.S. 186, 199, 7 L. Ed. 2d 663, 675). The action sought to protect rights defined by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, thus:

> "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (377 U.S. 555, 12 L. Ed. 523-524).

The Trial Court Properly Enjoined the Holding of the Election

The Appeals Court held the District Court to have no power to enjoin the holding of the general election under *Hamer* v. *Campbell*, (5th Cir. 1966) 358 F.2d 215, cert. den. 385 U.S. 851, 16 L. Ed. 2d 612) and *Bell* v. *Southwell*, (5th Cir. 1967) 376 F.2d 659. "There can be no question", said the Court in *Hamer*, "that a district court has the power to enjoin the holding of an election (358 F.2d 221)". The only question the Appeals Court could have determined was whether the case was one appropriate for the relief sought, and as well said in *McGill* v. *Ryals*, (U.S. District Court M.D., Ala., N.D., Mar. 31, 1966) 253 F. Supp. 374, 376:

> "We know of no mechanistic formula to apply, nor compelling legal argument which can help us make this determination."

Neither the briefs nor the opinion below challenged the findings of fact and conclusions of law made by the Trial Court following the hearing for preliminary injunction, and we have attached them as pp. 1-10 of the Appendix. In justice to the District Court, they merit attention. They show that: Spurious ballots were stuffed for Ammerman so as to dilute the vote of each elector who voted for Collins, and to indicate Ammerman the apparent winner, although Collins received the majority of the legal votes cast (¶IX, App. 4); the appeal from the State judgment ordering a new election had been set for submission and argument on the day before the deadline for printing absentee ballots (¶¶XIV, XV, App. 5); considering the nature of the case, the election contest will not be finally determined in time for the beginning of absentee balloting, and consequently the suit will be declared moot under the Texas practice (¶¶XVII and XVIII, App. 6), in

which event the Plaintiffs would suffer irreparable injury by Ammerman being named County Judge (¶XXI, App. 7); and in the event the Clerk was not restrained, he would order the printed ballots not later than the deadline date with the name of Ammerman appearing as the nominee of the party (¶XIX, App. 7).

Bear in mind that this District Court had received in evidence all of the proceedings in the State election contest, including the findings of fact and the opinion-judgment of the State Trial Judge of July 27, 1970. In it the State Court had found the primary election so irregular that he felt compelled to set it aside.

The District Court was charged with notice of the substantial interest of all of the voters in honest elections. We quote one of the conclusions of law he made:

> "IV. Considering the relative importance of the rights asserted by the Plaintiffs and the acts sought to be enjoined, the irreparable nature of the injury that would flow from denial of preliminary relief, the probability of the ultimate success or failure to gain the entire relief sought by the Plaintiffs, and the balancing of damage and convenience generally, as well as the interest of the public, the Court concludes that a Preliminary Injunction to protect the Plaintiffs' rights should issue." (Conclusions of Law, App. 9).

The Appeals Court reviewed the District Court action just as though an election had been held and the District Court had ordered it set aside. To the contrary, the distinction between equitable relief in such case and in ours is well marked by this language from *Hamer* (supra, p. 14):

> "This action does not mean that we necessarily would set aside every election in which a substantial num-

ber of citizens have been denied the right to vote. *This is not a case where an election is challenged for the first time after it is held.* Here appellants attempted to enjoin the election, and failing where they should have succeeded, they were diligent in seeking to have this failure rectified by our reversal prior to the election. Our absence of facilities to rectify rapidly should not now prevent us according full relief to appellants." (358 F.2d at 222, emphasis added).

CONCLUSION

Under *Monroe* v. *Pape*[2] and *McNeese* v. *Board of Education*,[3] the District Court was under no obligation to withhold granting substantive relief before disposition of the State election contest. Nevertheless, he invoked the doctrine of absention,[4] and entered only such orders as would protect the *status quo* pending the outcome of the election contest in State Court (App. 15-16).

We believe that this extending of the courtesy of comity by the Federal District Court does not merit the conclusion of the Appeals Court that this action resulted in a head-on collision between the Federal District Court and the Texas Court of Civil Appeals (App. 39), nor the singular conclusions found in the State Appellate opinion (App. 33-37). The preliminary injunction simply sought to remove the unconstitutional barrier to final decision of the State election contest, and permit a completion of the trial on its merits. It is true that when the Texas Appel-

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2. *Monroe* v. *Pape*, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503.

3. *McNeese* v. *Board of Education*, 373 U.S. 668, 671-672, 10 L. Ed. 2d 622, 625.

4. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 502, 85 L. Ed. 971, 975. Compare: *Zwickler* v. *Koota*, 389 U.S. 241, 19 L. Ed. 2d 444.

late Court twice refused to consider the merits of the contest under the unconstitutional "mootness doctrine", that the Federal District Court was obliged to complete the trial of the present action.

The circumstance that on final disposition the District Court accepted facts found in the only judgment on the merits in the State election contest, and concluded therefrom that Ammerman was collaterally estopped to deny that Collins received the majority of the votes cast, by no means justifies the statements of the Appeals Court that the District Court decided the local contest (App. 39). Nor did it justify that Court's conclusion that the District Court "named Collins as the County Judge of Harrison County" (App. 50). To the contrary, the application of the doctrine of collateral estoppel made unnecessary the holding of another primary election, leading the District Court to allow complete relief by simply ordering a special general election with the ballot carrying the name of Collins as the nominee of the Democratic Party.

Although the Appeals Court opinion expressed its displeasure with the results of the trial on the merits, it concluded it could not review it because the "jurisdiction was based on retained jurisdiction" (App. 66). Bear in mind that all parties, including the candidate, were before the Court for the trial on the merits. It can scarcely be suggested that where no general election has been held for whatever reason, a District Court may not protect the civil rights of the voters and a candidate to the extent of ordering a special general election. We do not think this jurisdiction would be defeated, even had the same Court lacked jurisdiction to enter an earlier ancillary order.

For the foregoing reasons, it is submitted that the Petition for Certiorari should be granted to review the

judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was this the..... day of ....., placed in the United States Mail, postage prepaid, to Mr. William M. Huffman, P. O. Box M, Marshall, Texas 75670, and Mr. Austin C. Bray, Jr., Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, Attorneys of Record for Respondents.

.....
Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

C. A. NO. 1472

ROY HUBBARD, ET AL.,
Plaintiffs,

vs.

JIM AMMERMAN, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on for hearing on the request of the Plaintiffs for a Preliminary Injunction and the Court having duly considered the verified Complaint of the Plaintiffs, the documents filed as exhibits and the evidence received by the Court, and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

I.

Each of the Plaintiffs were on May 2, 1970, qualified voters of Harrison County, Texas, and voted for James S. Collins for Democratic nominee for the office of County Judge of Harrison County, Texas, in the Primary Election of May 2, 1970, held by the Democratic Party of Harrison County, Texas, and called "Primary Election" hereinafter.

II.

On canvass of the votes of the Primary Election, the candidate opposing James S. Collins, Honorable Jim Ammerman, was declared winner of the nomination for the

office of County Judge by sixteen votes, and his name was duly certified to the County Clerk by the Democratic Executive Committee of Harrison County, Texas as the winner of the Primary Election for such office.

III.

On trial of Cause No. 25,400, *Jim Ammerman* v. *James S. Collins,* In the District Court of Harrison County, Texas, hereinafter called "the election contest", fifty-five ballots cast in the Primary Election for County Judge were thrown out as fraudulently cast, and it was determined that one of these was voted for James S. Collins, one was lost, and the remaining fifty-three were voted for Honorable Jim Ammerman.

IV.

The facts adduced on trial of the election contest suit showed that the ballots cast out were all voted as absentee ballots, and were in most instances procured and voted by those other than the voters named on the ballot, so as to amount to "ballot box stuffing".

V.

Of the fifty-five voters whose absentee ballots were thrown out, forty-nine were members of the Negro race, and six were members of the White race.

VI.

The forty-nine members of the Negro race were sent absentee ballots by reason of the work of all or a part of the members of a group of four persons, two black and two white, and most of the Negroes for whom ballots were cast neither applied for an absentee ballot nor actually voted the ones returned in their names.

VII.

The work of the four persons in procuring and voting ballots unsolicited by the voters was centered on members of the Negro race, and constituted an infringement on and a discrimination against their right to vote by reason of their race and color, as evidenced by the fact that at least two of the victims attempted to vote at the polls on election day, and were not allowed to do so because they had, without their knowledge, been voted absentee (Plaintiffs' Exhibits 12, Mose Roach, p. 169; and 14, Willie Lee Roach, p. 181).

VIII.

The deduction by the Trial Court of the fifty-three votes for Honorable Jim Ammerman from his total, and of the one vote for James S. Collins from his total, caused the Court to decree that Collins had thirty-six more legal votes than Ammerman in the Primary Election.

IX.

The casting of the fifty-three illegal absentee ballots for Ammerman operated to dilute the vote of each elector who voted for Collins in such a way as to cause Ammerman to be the apparent winner of the Primary Election, when in truth and fact the majority of the legal votes balloted were cast for James S. Collins.

X.

The judgment in the election contest suit, with ample factual support, declared the Primary Election, insofar as the nominee for County Judge of Harrison County is involved, to be invalid, and ordered the Executive Committee of the Harrison County Democratic Party, called "Committee" hereinafter, to call a new election to select a

nominee for that Party for the office of County Judge of Harrison County, Texas.

XI.

The Plaintiff in the election contest suit sought to mandamus the Committee to carry out the judgment in the election contest case, but was refused leave to file his petition by the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, Texas, and immediately thereafter, the Plaintiff filed a transcript and brief in that Court as an appeal from the election contest judgment

XII.

The appeal was styled, Cause No. 8012, In the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, Texas, *James S. Collins, Appellant* v. *Jim Ammerman, Appellee,* and which cause will hereinafter be called "appeal".

XIII.

The Appellant Collins filed with the transcript on August 17, 1970, a Motion to Advance the Appeal, in accordance with the provisions of the Texas Election Code, and give it preference over all other cases on the docket.

XIV.

The Motion to Advance was not acted on until September 8, 1970, at which time the cause was set down for submission and oral argument on October 2, 1970, this being one day before the deadline then set by the County Clerk of Harrison County, Texas for sending in an order for printed ballots for the General Election of November,

1970, and the placing of a name thereon as Democratic nominee for County Judge of Harrison County, Texas.

XV.

On September 9, 1970, the County Clerk of Harrison County, Texas, conferred with his printer and revised the deadline for sending in material for printing the ballot described in the preceding paragraph to be October 7, 1970, instead of October 3, 1970, and on the same day the Texarkana Court of Civil Appeals rescinded its order of September 8, 1970 and reset the appeal for submission and argument for October 6, 1970.

XVI.

A cross-appeal has been filed in the appeal by Honorable Jim Ammerman, and he has filed therein a Statement of Facts consisting of some thirteen volumes containing some four thousand pages.

XVII.

Consideration of the judgment in the election contest and the voluminous testimony that must be reviewed in determining the appeal compels the factual conclusion that the appeal and election contest suit will not be finally determined in time for the beginning of absentee balloting for the office of County Judge of Harrison County, Texas on October 14, 1970.

XVIII.

Under the Texas practice, the appeal and election contest suit will be declared moot, and the name of Honorable Jim Ammerman would be printed on the ballot if the appeal and election contest suit is not finally determined before the deadline for ordering the printed ballots expires on October 7, 1970.

XIX.

In the event Honorable Glenn Link, County Clerk of Harrison County, Texas, is not judicially ordered to do otherwise, he will on September 26, 1970 publish or post the name of Honorable Jim Ammerman as Democratic nominee for the office of County Judge of Harrison County, Texas under the applicable provisions of the Texas election laws, and will not later than October 7, 1970 order the printed ballots for the November 1970 General Election, with the name of Honorable Jim Ammerman appearing on such ballots as the nominee of the Democratic Party of Harrison County, Texas for the office of County Judge of Harrison County, Texas.

XX.

A copy of the judgment in the election contest suit was delivered to the Chairman of the Democratic Executive Committee of Harrison County, Texas, and on July 30, 1970 and August 14, 1970, at a meeting of the Committee, its Chairman recommended that the judgment in the election contest suit be enforced and a new election called, but the Committee refused to follow the judgment and call the election provided for therein.

XXI.

Should the appeal and election contest suit be declared moot, under the practice indicated in Finding XVIII above, the Plaintiffs and the other electors on whose behalf the Plaintiffs sue will suffer irreparable injury through the Honorable Jim Ammerman being named County Judge of Harrison County, Texas by the General Election, when in truth and fact he did not receive a majority of the legal votes cast at the Primary Election, all of which would amount to a refusal to count the votes cast

by said Plaintiffs or those whom they represent, or at best a dilution of the weight to be given the same on account of the ballot stuffing found.

XXII.

No controverting affidavit was filed by any of the Defendants challenging the verified complaint of the Plaintiffs or any of the other documents on file in support of the complaint.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

The Plaintiffs, and the other electors on whose behalf this action was brought, have a justiciable interest in this case by reason of the dilution of their votes through ballot box stuffing in violation of rights guaranteed them, both under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, and under the Voters' Rights Acts of 1964 (42 *U.S.C.A.*, §1971, et seq.) and 1965 (42 *U.S.C.A.*, §1973, et seq.).

II.

This Court has jurisdiction of this cause perforce the violations specified in the preceding paragraph and the provisions of the Civil Rights Act (42 *U.S.C.A.*, §1983).

III.

The Plaintiffs have exhausted all legal remedies allowed them by State procedure, and have no adequate remedy to protect their rights other than through the actions of this Court as one of equity.

IV.

Considering the relative importance of the rights asserted by the Plaintiffs and the acts sought to be enjoined, the irreparable nature of the injury that would flow from denial of preliminary relief, the probability of the ultimate success or failure to gain the entire relief sought by the Plaintiffs, and the balancing of damage and convenience generally, as well as the interest of the public, the Court concludes that a Preliminary Injunction to protect the Plaintiffs' rights should issue.

V.

The County Clerk of Harrison County, Texas, his representatives, employees and successors and the members of the Harrison County Election Board, their deputies, representatives, employers and successors should be restrained and enjoined from printing or causing to appear on the ballot for the General Election of November 1970, the name of Honorable Jim Ammerman as nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, and from in any way placing anything on said printed ballot which pertains to the office of County Judge of Harrison County, Texas.

VI.

The numbers of the Harrison County Election Board, their deputies, representatives, employees and successors should be restrained and enjoined from providing any election supplies to the presiding Judges of the official election precincts of Harrison County, Texas for the November 1970 General Election for the office of County Judge of Harrison County, Texas.

VII.

Every voter and elector participating in the General Election to be held in November 1970, should be restrained and enjoined from writing in the name of the office of County Judge of Harrison County, Texas, and the name of any person for such office on the ballot for the General Election of November 1970, and all election clerks and judges thereof should be restrained and enjoined from counting and marking any return of write-in votes for such office in said election and the Commissioners' Court of Harrison County, Texas should be restrained and enjoined from canvassing any purported returns from said election for such office and certifying the result of the same as to said office.

VIII.

The Court should retain jurisdiction in this entire cause so that proper orders may be entered as matters develop in the future.

IX.

That the action of the Democratic Executive Committee of Harrison County, Texas in refusing to call a new election amounted to State action as contemplated by the Fourteenth Amendment to the United States Constitution and operated to ratify the ballot stuffing shown in the judgment in the election contest suit.

X.

The action of the State Courts of Texas in decreeing that no matter what injury to or deprivation of rights of nominees and electors in a Democratic Primary Election might be, that nevertheless if an election contest suit could not be finally determined by the last date possible for or-

dering printed ballots for the General Election, that the nominee certified by the Primary would have his name placed upon the ballot for the General Election amounted to State action as contemplated by the Fourteenth Amendment of the United States Constitution.

XI.

The members of the Negro race who did not apply for absentee ballots, and who had absentee ballots voted in their name by other persons were denied their right to vote and the same was abridged by State action on account of race, color or previous condition of servitude in violation of the Fifteenth Amendment to the Constitution of the United States.

Let Preliminary Injunction issue, and Order be entered accordingly.

Signed and entered, nunc pro tunc, March 26, 1971.

/s/ Wm. Wayne Justice

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CIVIL ACTION NO. 1472

ROY HUBBARD, ET AL.,

v.

JIM AMMERMAN, ET AL.

(Filed May 27, 1972)

FINDINGS OF FACT

1. Intervenor, James S. Collins, and defendant, Jim Ammerman, were the candidates for the office of County Judge of Harrison County, Texas, in the Primary Election of the Democratic Party held on May 2, 1970, having duly qualified and their names having been placed on the ballot of said Primary Election.

2. On May 2, 1970, plaintiffs and intervenor were qualified voters of Harrison County, Texas, and voted in the said Primary Election for intervenor James S. Collins as Democratic nominee for the office of County Judge of Harrison County, Texas.

3. Upon a canvass of the votes of the Primary Election by the Harrison County Democratic Executive Committee, defendant was declared winner of the nomination for the office of County Judge by 16 votes, 4073 to 4057, and his name was duly certified to the County Clerk by the said Executive Committee as the winner of the Primary Election for such office.

4. Intervenor timely filed and prosecuted (t)his election contest in the manner and form prescribed by the elec-

tion laws of the State of Texas, alleging that certain absentee ballots by mail were illegally cast for defendant and that if said ballots were deducted from the total of defendant's votes, intervenor was the legally elected nominee.

5. Defendant joined issue in Cause No. 25,400, styled *James S. Collins* v. *Jim Ammerman*, in the District Court of Harrison County, Texas, denying the illegal votes, and alleging that a number of voters, including intervenor and certain of the plaintiffs herein, had cast illegal ballots, in that they voted in an election precinct or voting box other than that of their residence.

6. Intervenor answered, contending that such votes were not illegal, since they resulted from errors of the voter registrar in furnishing registration certificates calling for such voters to vote outside the precinct of their residence, and naming an additional number of voters who likewise voted outside the precinct of their residence by virtue of incorrect registration cards. Intervenor further alleged that there were many other voters in the same situation. Alternatively, intervenor prayed for a new election.

7. On the trial of this cause, fifty-five ballots cast for the office of County Judge in the Primary Election were adjudged to have been fraudulently cast, and it was determined that one of these was voted for intervenor, one was lost, and the remaining fifty-three were voted for defendant.

8. The deduction by the trial court of the fifty-three votes for defendant from his total, and of the one vote for intervenor from his total, caused the court to decree that intervenor had thirty-six more legal votes than defendant in the Primary Election, 4056 to 4020.

9. Of the fifty-five voters whose absentee ballots were adjudged to be illegal, forty-nine were members of the Negro race, and six were members of the White race.

10. The fact that the absentee ballots adjudged to be fraudulent were primarily cast in the names of members of the Negro race constituted an infringement on and a discrimination against their right to vote by reason of their race and color, as evidenced by the fact that at least two of the victims attempted to vote at the polls on election day, and were not allowed to do so because they had, without their knowledge, been voted absentee.

11. The casting of the fifty-three illegal absentee ballots for defendant operated to dilute the vote of each elector who voted for intervenor in such a way as to cause defendant to be the apparent winner of the Primary Election.

12. At the trial of Cause No. 25,400, styled *James S. Collins v. Jim Ammerman*, testimony was taken for approximately two months, following which the trial court made extensive findings of fact and conclusions of law, as well as filing an opinion. The trial was conducted in a procedurally fair manner.

13. On the 27th day of July, 1970, the judgment in the election contest suit declared the Primary Election, insofar as the nomination for County Judge of Harrison County was involved, to be invalid, and ordered the Executive Committee of the Harrison County Democratic Party to call a new election to select a nominee of the Democratic Party for the office of County Judge of Harrison County, Texas.

14. A copy of the judgment in the election contest suit was delivered to the Chairman of the Democratic Executive Committee of Harrison County, Texas, on July

30, 1970; but on August 14, 1970, the Committee refused to follow the judgment and call the election provided for therein.

15. Intervenor sought a writ of mandamus, to compel the committee to carry out the judgment of the state district court election contest case, but was refused leave to file his petition by the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, Texas; and immediately thereafter, he filed a transcript and brief in that court, as an appeal from the election contest judgment.

16. The appeal was styled "Cause No. 8012. In the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, Texas, James S. Collins, Appellant v. Jim Ammerman, Appellee."

17. Intervenor filed with the transcript on August 17, 1970, a motion to advance the appeal, in accordance with the provisions of the Texas Election Code, praying that it be given preference over all other cases on the docket.

18. The motion to advance was not acted on until September 8, 1970, at which time the cause was set down for submission and oral argument on October 2, 1970, this being one day before the deadline then set by the County Clerk of Harrison County, Texas, for ordering printed ballots for the General Election of November 3, 1970, and the placing of a name thereon as the Democratic nominee for County Judge of Harrison County, Texas.

19. On September 9, 1970, the County Clerk of Harrison County, Texas, conferred with the printer and changed the deadline for sending in material to be printed on the ballot described in the preceding paragraph to October 7, 1970 (instead of October 3, 1970). On the same day, the Texarkana Court of Civil Appeals rescinded its

order of September 8, 1970, and re-set the appeal for submission and argument on October 6, 1970.

20. A cross-appeal was filed by defendant. A Statement of Facts was filed, which consisted of thirteen volumes containing some 4,000 pages. Prior to the filing of such Statement of Facts, intervenor filed an application and motion to shorten the time for appeal and to shorten and condense the record on appeal.

21. On September 10, 1970, plaintiffs herein filed, in this court, an application for preliminary injunction to stay the holding of the General Election for the office of County Judge of Harrison County, Texas. This court concluded that it was not likely that the appeal and election contest suit could be finally determined in time for the beginning of absentee balloting for the office of County Judge of Harrison County, Texas, on October 14, 1970, because of the voluminous record to be reviewed; and an injunction was granted on September 29, 1970.

22. Under the Texas practice, the appeal and election contest suit would have been declared moot, and the name of defendant would have been printed on the ballot, if the appeal and election contest suit had not been finally determined before the deadline for ordering the printed ballots expired on October 7, 1970.

23. If the appeal and election contest suit had been declared moot, plaintiffs and the other electors on whose behalf plaintiffs sued would have suffered irreparable injury, through defendant's being named County Judge of Harrison County, Texas, at the General Election, when in truth and fact he may not have received a majority of the legal votes cast at the Primary Election.

24. It was because of the possibility that the election contest would be declared moot, and in order to allow

the courts of the State of Texas to try the election contest to a conclusion on its merits, that this court abstained from making a substantive decision in this cause, but, rather, entered the preliminary injunction of September 29, 1970, enjoining the holding of a General Election for the office of County Judge of Harrison County, Texas.

25. On October 6, 1970, the Texarkana Court of Civil Appeals rendered its opinion holding that the District Court of Harrison County had no authority to call a new election and ordering it to proceed with the re-trial and recount of ballots to ascertain the true results of the election.

26. After a two day re-trial, or a continuation of the first trial, the District Court of Harrison County entered its judgment on October 12, 1970, declaring the intervenor to be the nominee of the Democratic Party for the office of the County Judge of Harrison County, Texas, by 3,960 to 3,945 votes.

27. Continuing to follow the doctrine of abstention, this Court, on October 13, 1970, held in effect the preliminary injunction of September 29, 1970, at the request of counsel for defendants, who expressed a desire to appeal from the October 12, 1970, judgment of the state district court; and, further, this court refused to order the name of intervenor certified to the County Clerk of Harrison County, Texas, as the nominee of the Democratic Party for the General Election, as moved by counsel for plaintiffs.

28. Defendant prosecuted an appeal from the October 12, 1970, judgment of the District Court of Harrison County, Texas; and such appeal was perfected on December 7, 1970. In anticipation of this action, intervenor had filed with the Texarkana Court of Civil Appeals a motion

to advance the cause. Intervenor filed his brief on December 10, 1970. Defendant filed his brief as appellant on December 29, 1970; and intervenor filed his brief as cross-appellant (on costs) on January 15, 1971. The motion to advance was acted upon on December 22, 1970; and the appeal was set for hearing for January 26, 1971.

29. On March 9, 1971, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, held that it had been ousted of jurisdiction by reason of the preliminary injunction issued by this Court on September 29, 1970, and declared that the election contest was moot, refusing to consider the intervenor's appeal from the costs assessed in the October 12, 1970, judgment of the state district court.

30. On the first appeal of the contest, the Texarkana Court of Civil Appeals adjudged costs against intervenor. At the same term of court intervenor filed a motion for the court to readjudge and reassess costs. Intervenor subsequently requested the Texarkana Court of Civil Appeals to treat said motion to readjudge and reassess costs as if filed in the second appeal, and to consider it along with the intervenor's appeal from that part of the judgment that assessed costs against intervenor and his bondsmen.

31. Notwithstanding the decree of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, that it had no jurisdiction to consider the adjudication of costs, it nevertheless did judicially consider the costs, and did assess them against the intervenor and his bondsmen in its mandate of March 9, 1971.

32. On March 10, 1971, the day after the Court of Civil Appeals for the Sixth Supreme Judicial District of

Texas, at Texarkana, issued its mandate ordering the District Court to dismiss the contest suit, defendant issued a press release stating that he would continue to serve as County Judge of Harrison County, Texas, for the full four year term beginning January 1, 1971, unless he decided to resign earlier.

33. On March 15, 1971, defendant filed a motion in the District Court of Harrison County, Texas, to dismiss Cause No. 25,400, styled *James S. Collins* v. *Jim Ammerman*, which motion prayed the District Court of Harrison County, Texas, to assess costs against intervenor and the sureties on intervenor's bond.

34. Intervenor filed an application for temporary restraining order in this court against the Clerk of the District Court of Harrison County, Texas, the Clerk of the Court of Civil Appeals, defendant, and the Honorable John Furrh, District Judge of Harrison County, Texas, to prevent the dismissal of the election contest and the assessment of costs against intervenor and his sureties. The restraining order was granted on March 19, 1971, and was continued in force and effect by agreement of the parties, made in open court, on March 26, 1971.

35. The court infers from the record, and finds as a fact, that the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, made a studied and deliberate attempt to avoid deciding the election contest case on its merits prior to the date of the holding of the General Election on November 3, 1970, so as to be able to declare the election contest moot, and thus avoid deciding the case on its merits.

CONCLUSIONS OF LAW

1. The mootness doctrine, enunciated in *Polk* v. *Davidson*, 145 Tex. 200, 196 S.W. 2d 632 (1946) and subsequent cases cited by the defendant Ammerman in his brief and sought to be applied by the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, results inevitably in the denial to the electors who voted for the contestant in an election contest of the right to vote and to have one's vote counted, in violation of the Fourteenth Amendment.

2. The mootness doctrine enables any contestee in an election contest, with minimal diligence, to delay the conclusion on its merits of a primary election contest until such time as the State courts will declare such contest moot. Therefore, the mootness doctrine denies the voters who voted for contestant any effectiveness for their votes, when such votes have been or would be determined in the trial of an election contest to be a majority of the votes legally cast for the office in question.

3. The enforcement of the mootness doctrine by the Texas courts, particularly the Texarkana Court of Civil Appeals, amounts to State action and constitutes a custom and usage employed and enforced by the State to deprive the plaintiff and intervenor of their constitutional rights under the Fourteenth Amendment.

4. The plaintiffs, and other electors on whose behalf this action was brought, have a justifiable (justiciable) interest in this case by reason of the dilution of their votes through ballot box stuffing in violation of rights guaranteed them, under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, the Voters' Rights Acts of 1964 (42 U.S.C.A., §1971, et seq.) and 1965 (42 U.S.C.A., §1973, et seq.) and the Civil Rights Act of 1871 (42 U.S.C.A. §1983 and 28 U.S.C.A. §1343(3) and (4)).

5. The members of the Negro race who did not apply for absentee ballots, and who had absentee ballots voted in their name by other persons were denied their right to vote and the same was abridged by State action on account of race, color or previous condition of servitude in violation of the Fifteenth Amendment, and in violation of the Voters Rights Act of 1964, 42 U.S.C.A. §1971, et seq., the Voters Rights Act of 1965, 42 U.S.C.A. §1973, et seq. and the Civil Rights Act of 1871, 42 U.S.C.A. §1983.

6. This court properly exercised its equity powers pursuant to 28 U.S.C.A. §1343 (3) and (4), 42 U.S.C.A. §1971 et seq., 42 U.S.C.A. §1973, and 42 U.S.C.A. §1983 et seq. to enjoin the holding of the General Election for the office of County Judge of Harrison County, Texas, in order to protect the voters who voted for the contestant from deprivation of their right to vote and to have their vote counted by the use of the mootness doctrine.

7. This court, having enjoined the holding of the General Election on November 3, 1970, in order to permit the State courts to conclude the election contest suit and thereby finally dispose of the constitutional and federal law questions raised and the State courts having concluded their consideration of the litigation by refusing to exercise their jurisdiction to act preserved for these courts by the preliminary injunction, thus bringing to an end the basis for abstention, this court has power to protect the rights of the intervenor and plaintiffs by ordering the name of the intervenor placed on the ballot for a General Election, and ordering the holding of such an election.

8. Because it is necessary in aid of its jurisdiction previously exercised, and in order to protect and effectuate its judgment previously entered, this court may enjoin the enforcement of the judgment and mandate of the Court of Civil Appeals for the Sixth Supreme Judicial Dis-

trict of Texas, at Texarkana, dismissing the election contest.

9. Because 42 U.S.C.A. §1983 constitutes an expressly authorized exception to the Anti-Injunction Act, 28 U.S.C.A. §2283, this court may enjoin enforcement of such judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, in order to vindicate Fourteenth Amendment rights of the electors who voted for the contestant, intervenor James S. Collins. Alternatively, 28 U.S.C.A. §2283 does not apply at all to 42 U.S.C.A. §1983.

10. By refusing to consider the issues in the election contest, the Texarkana Court of Civil Appeals denied to the voters of Harrison County, Texas, their rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Voters' Rights Act of 1964, 42 U.S.C.A. §1971, et seq., the Voters' Rights Act of 1965, 42 U.S.C.A. §1973, et seq., and the Civil Rights Act of 1871, 42 U.S.C.A. §1983.

11. The findings of fact and conclusions of law made by the trial judge in support of his opinion and judgment of July 27, 1970, in Cause No. 25,400 were the result of full litigation between the intervenor, James S. Collins, and the defendant, Jim Ammerman, on the issues determined therein. The defendant, Jim Ammerman, having challenged the findings and conclusions with respect to the absentee votes thrown out by the trial judge, and those findings and conclusions not having been disputed by the Texarkana Court of Civil Appeals in its reversal of the July 27, 1970, judgment for trial of factual issues pertaining to other matters, Ammerman cannot now complain that the trial court's findings and conclusions as to the absentee votes were not dispositive of the legality of said votes.

12. Since the Court of Civil Appeals refused to pass upon the merits of the election contest appeal, the decision of the District Judge of Harrison County, Texas, 71st Judicial District, was the last State court ruling on the issues of the election contest. Thus, the doctrine of collateral estoppel comes into play, and the defendants are estopped to deny or question the findings of fact and conclusions of law entered by the trial judge, the Honorable John Furrh, on October 12, 1970.

13. Fundamental considerations of equity prohibit this court from giving credence to the merely formal canvass of votes by the Harrison County Democratic Executive Committee, rather than to the results of the lengthy and extensive proceedings in the District Court of Harrison County, Texas, 71st Judicial District, in the election contest brought by intervenor, James S. Collins, against defendant, Jim Ammerman.

14. The effort of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, to judicially determine who should pay the costs in the election contest proceedings, after it had denied the intervenor, James S. Collins, the right of a hearing on the subject because said court lacked jurisdiction to consider the motion and appeal of said intervenor on the question of costs, amounted to a denial to the intervenor of equal protection of the law, and the taking of his property without due process, in violation of the Fourteenth Amendment.

15. To avoid irreparable damage that would result to the plaintiffs and intervenor if equitable relief not be given them in this proceeding, it is necessary that this court grant a permanent injunction against Mrs. Lonnie E. Henry, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, and

against Jack S. Moore, Clerk of the 71st Judicial District Court of Harrison County, Texas, enjoining each of such officers from levying execution for costs against the intervenor and his bondsmen in the election contest case.

16. The temporary restraining order against the Judge of the 71st Judicial District Court of Harrison County, Texas, should be enlarged to enjoin said judge from setting aside the judgment of October 12, 1970 or dismissing the election contest. In order to avoid irreparable damage to the intervenor, he should be declared the winner of the May 2, 1970 primary election for the nomination of County Judge of Harrison County, Texas.

17. This court is lawfully entitled to enter an order directing that the name of James S. Collins be placed upon the ballot for the special general election for the office of County Judge of Harrison County, Texas, which will be ordered subsequently by the court.

SIGNED and ENTERED this 27th day of May, 1971.

/s/ Wm. Wayne Justice
United States District Judge

NO. 25,400

IN THE DISTRICT COURT OF HARRISON COUNTY, TEXAS

JAMES S. COLLINS,

vs.

JIM AMMERMAN.

(Filed October 12, 1970)

JUDGMENT

Came on to be heard the above entitled and numbered cause in regular order, wherein JAMES S. COLLINS is Contestant, and JIM AMMERMAN is Contestee, and on remand from the Court of Civil Appeals, Sixth Supreme Judicial District; and, came the parties in person and by their Attorneys and announced ready for trial, and the court having considered the pleadings, evidence, and arguments of counsel did ascertain therefrom the true and correct result of the election of the Democratic Nominee for the Office of County Judge of Harrison County, Texas, and such result being that James S. Collins, Contestant, received a total of 3,960 legal votes, and Contestee, Jim Ammerman, received a total of 3,945 legal votes, giving the Contestant a majority of 15 votes;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that JAMES S. COLLINS having received the greater number of legal votes cast in the Democratic Primary election of May 2nd, 1970, for Democratic Nominee for the Office of County Judge of Harrison County, Texas; that James S. Collins is hereby declared to be, and is the duly elected Democratic Nominee for the Office of County Judge of Harrison County, Texas;

IT IS FURTHER ORDERED that this Judgment be certified to the County Clerk of Harrison County, Texas, for observance, subject only to the approval of the U. S. District Court for the Eastern District of Texas, by causing the name of James S. Collins to be placed or printed on the official ballot for the General Election of November 3rd, 1970, as the Nominee of the Democratic Party for the office of County Judge of Harrison County, Texas. All costs incurred in the Court of Civil Appeals in Cause No. 8012, on the docket of said court, styled JAMES A. COLLINS, Appellant, vs. JIM AMMERMAN, Appellee, and all costs incurred in this court prior to October 8th, 1970, having been taxed against the Contestant by the Court of Civil Appeals in said proceeding;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Contestee, Jim Ammerman, recover judgment against the Contestant, James S. Collins and his Sureties, Franklin Jones, Sr., and Earl Sharp, jointly and severally for the sum of Three Thousand, Seven Hundred ($3,700.00) Dollars, the amount of the appeal bond filed herein, and that the Contestee, Jim Ammerman, recover judgment against the Contestant for all other costs incurred herein, except those expressly taxed against the Contestee.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs incurred herein on or after October 8th, 1970, are taxed against the Contestee, and that either party may have execution for the costs recovered by him.

/s/ John Furrh
Judge Presiding.

MR. SMITH: To which we except.

THE COURT: Let the record show that the Contestee has excepted to the Judgment of the Court.

COURT OF CIVIL APPEALS
SIXTH DISTRICT
TEXARKANA, TEXAS

No. 8031

JIM AMMERMAN,
Appellant,

vs.

JAMES S. COLLINS,
Appellee and Cross-Appellant.

Appeal from the District Court of
Harrison County, Texas

(Reported 464 S.W.2d 184)

This is the second appeal of the First Democratic Primary Election contest for the office of County Judge of Harrison County, Texas. The First Democratic Primary Election was held on May 2, 1970. There were only two candidates for the office: Hon. Jim Ammerman, hereinafter referred to as Ammerman, County Judge of Harrison County; and James S. Collins, hereinafter referred to as Collins.

A canvass of the votes showed that Ammerman received 4,073 votes and Collins received 4,057 votes. Ammerman was certified as the Democratic nominee for the office of County Judge of Harrison County at the General Election to be held on November 3, 1970.

On May 14, 1970, Collins filed a contest of the First Democratic Primary Election against Ammerman. On July 27, 1970, the Trial Judge entered an opinion in which he held the election for County Judge was invalid and

directed the Harrison County Democratic Executive Committee to call a new Special Democratic Primary Election for the office of County Judge as between Ammerman and Collins. There is no provision of the Texas Constitution, nor the Election Code of the State of Texas, whereby any such election could be held; and, definitely no provision whereby the expenses of printing the ballots and holding the Special Democratic Primary Election could be paid for, either by the candidates or by the county. Both Collins and Ammerman appealed from that opinion. This Court, not being apprised of the fact that the United States District Court for the Eastern District of Texas, Marshall Division, hereinafter referred to as U.S. District Court, had acquired, or assumed, jurisdiction of the contested First Democratic Primary Election case. We proceeded to enter an opinion on October 6, 1970, Collins vs. Ammerman, C.C.A., 1970, 459 S.W. 2d 891, in which we directed that the Trial Court hear all the evidence if it could do so and render a final judgment in time for the ballots to be printed, so that absentee voting could begin twenty days prior to November 3, 1970, General Election.

As far as we know, the Harrison County Democratic Executive Committee did not call the Special Democratic Primary Election. Neither have we been informed of the fact that they have been cited for Contempt of Court for failing to do so.

Thereafter, the Trial Court entered a judgment in which it certified that Collins had received a majority of the legal votes cast in the First Democratic Primary Election and ordered Collins certified as the nominee of the Democratic Party for the Office of County Judge. As will later be shown, the Trial Court had no jurisdiction in the case because it had been acquired, or assumed, by the U.S. District Court. Anyway, Ammerman excepted to the

judgment of the Court, gave notice of appeal and filed an Appeal Bond within five days thereafter. The judgment of the Trial Court is not dated. It was filed on October 12, 1970, just two (2) days before absentee voting was to commence in the General Election.

Sometime prior to September 29, 1970, a suit was filed in the U.S. District Court, apparently as a class action, by Roy Hubbard, et al, plaintiffs, vs. Jim Ammerman, et al, defendants, Civil Action No. 1472, contesting the results of the First Democratic Primary Election for the office of County Judge of Harrison County. The pleadings do not appear in the record of this case. Ammerman filed a motion to dismiss the case which was overruled. The U.S. District Court entered a preliminary injunction, stating that, after due notice consideration of verified pleadings, all instruments on file as exhibits and having heard testimony from witnesses, he entered the preliminary injunction. It read as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

"Roy Hubbard, et al., Plaintiffs, vs. Jim Ammerman, et al., Defendants.	Civil Action No. 1472

"ORDER GRANTING PRELIMINARY INJUNCTION

"The Defendant's, Ammerman, Motion to Dismiss this cause, having been heard before trial on September 25, 1970, was in all things overruled, to which Defendant Ammerman excepted.

"Due notice having been given Defendants, the Plaintiffs' request for a Preliminary Injunction was then presented on the same date, and the Court having considered the verified Complaint and all instruments on file as exhibits, as well as having heard testimony from witnesses, and have considered the arguments of counsel and being fully advised in the premises, finds:

"That from the opinion of the District Court of Harrison County, Texas in Cause No. 25,400, James S. Collins v. Jim Ammerman, and evidence presented on this hearing, it appears that there is possibility that fraud has so permeated the Democratic Primary Election for a nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, as that the votes of persons who cast legal ballots may have been diluted.

"There is also a distinct possibility that a decision of said Cause No. 25,400 on an appeal that has been taken to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas sitting at Texarkana, Texas, may not be disposed of until after said Cause has become moot.

"The Court is of the opinion that unless Honorable Glenn Link, County Clerk of Harrison County, Texas, be restrained from placing the name of Honorable Jim Ammerman on the ballot for the General Election, as the nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, the appeal of said election contest, No. 25,400, may not be finally determined, and further that the Plaintiffs would suffer irreparable injury unless a Preliminary Injunction be granted.

"It is therefore, ORDERED, ADJUDGED AND DECREED that *pending further Order of this Court,* the Honorable Glenn Link, County Clerk of Harrison County, Texas, his deputies, representatives and employees and successors be, and he and they are, hereby restrained and enjoined from printing or causing to appear on the ballot for the General Election of November, 1970, *the name of Honorable Jim Ammerman as nominee of the Democratic Party* for the office of County Judge of Harrison County, Texas, *and from in any way placing anything on said printed ballot which pertains to the office of County Judge of Harrison County, Texas.*

"It is also ORDERED, ADJUDGED AND DECREED that the Defendants Glenn Link, N. F. Shivers, K. Harold Brown, Doyle Curry and Jim Ammerman, *individually and in their official capacities as the Harrison County Election Board,* their depu-

ties, representatives, employees and successors, *all be and they are hereby restrained and enjoined from providing any election supplies to the presiding judges* of the official election precincts of Harrison County, Texas for the November, 1970, General Election *for the office of County Judge of Harrison County, Texas, until further ORDER of this Court, and that said parties individually and in the capacity named be enjoined from holding an election for the office of County Judge of Harrison County, Texas, in the 1970 General Election.*

"It is further ORDERED, ADJUDGED and DECREED that *pending the further order of this Court, each and every voter and elector participating in the General Election to be held in November, 1970 is hereby restrained and enjoined from writing in the name of the office of County Judge of Harrison County, and the name of any person for such office on the ballot of the General Election of November, 1970 and all election clerks and judges are hereby restrained and enjoined from counting and making any* return of write-in votes for such office in said election and the Commissioners Court of Harrison County, Texas is hereby restrained and enjoined from canvassing any purported returns from said election for such office and from certifying the results of any such returns as to said office.

"It is further ORDERED, ADJUDGED and DECREED that *this order shall be effective from and after 5:00 p.m. September 25, 1970.*

"SIGNED and ENTERED this 29th day of September, 1970.

"/s/ William Wayne Justice
United States District Judge

"Filed U.S. District Court, Eastern District of Texas, September 29, 1970.

James R. Cooney, Clerk
By Carolyn Gist
Deputy

"A true Copy I Certify.

James R. Cooney, Clerk
U.S. District Court
Eastern District, Texas
By Carolyn Gist
Deputy

"Filed at 9:30 o'clock a.m. November 18, 1970

Jack A. Moore
Clerk District Court
Harrison County, Texas
By Mae Moos"

Emphasis added.

The above temporary injunction by the U.S. District Court, having been filed in the State Court and brought forward in the transcript, puts this Court on notice that the U.S. District Court has acquired, or assumed, jurisdiction in this case. The U.S. District Court did not follow the requirements of Title 42 U.S. Code Sec. 1973j-(d) which requires the United States Attorney General to take the first action for any relief, including a temporary or permanent injunction, restraining order or other action including an order directed to the United States or any local election officials required by them. There is no showing in the temporary injunction that it was brought by the United States Attorney General. Neither did the

United States Court follow the law as written in Title 42 U.S. Code Sec. 1973b-(a) requiring that any such action as to any voters in a State Election shall be heard and determined by a court of three Federal Judges.

There was no reasonable excuse for not following the requirements of the United States Code. Gray vs. Maine, D.C. Ala. 1968, 291 F. Supp. 998; State of S.C. vs. Katzenbech, S.P.D. 1966, 86 S. Ct. 803, 383 U.S. 301, 15 L. Ed. 2nd 769; Apache County vs. V.S.D.C., 1966, 256 F. Supp. 903; Garza vs. Smith, U.S. Dist. Ct. Western Div. of Tex., 1970, not yet printed. In any case, the burden of proof is upon the complaining parties of a state or political subdivision seeking a declaratory judgment or a preliminary injunction to prove that some effective rights have been abridged, or the right to vote because of race or color has been incurred. Gaston County, N.C. vs. U.S., D. Ct. 1969, 89 S. Ct. 1720; 395 U.S. 26, 23 L. Ed. 2d 309. Collins seems to rely on Hadnot vs. Amos, Ala. 1969, 9 S. Ct. 1101, 394 U.S. 358, 22 L. Ed. 2d 336. This suit was brought by the United States Attorney General, or under his instructions, and was heard before three Federal Judges. It was brought under the Civil Rights Act and the Alabama Corrupt Practice Act, Code of Alabama, Title 17, Sec. 274, 413 & 414. In that case, certain county officials, by certain maneuvers, had prevented Negro people from having their names printed on the Democratic ballot. There are other cases cited that have to do with the qualifications of the voters in a State Election or a subdivision thereof. The U.S. District Court, in the case at Bar, did not require any certification of any violation of any Civil Rights Act, or anything that was detrimental to any person or group of persons, nor did he acquire the assistance of two other judges to assist him in entering the temporary injunction.

Only one U.S. District Judge acquired, or assumed, jurisdiction and issued a temporary injunction in a contested Democratic Primary Election case in which he says that he heard evidence. The U.S. District Court says it appears there is a possibility that fraud has been committed in the First Democratic Primary Election for a nominee of the Democratic Party for the office of County Judge, and the votes of some persons who cast legal ballots may have been diluted. He had no jurisdiction to make any such holding or findings of fact.

The U.S. District Court enjoined and restrained Hon. Glenn Link, County Clerk of Harrison County, from placing the name of Ammerman on the General Election ballot as the nominee of the Democratic Party. A careful reading of the foregoing temporary injunction, actually, was that all of the qualified voters of Harrison County were not permitted to vote for a County Judge in the General Election. It seems to this writer that the U.S. District Court violated the Civil Rights of all the people who held voting certificates by the temporary injunction in not allowing them to vote for a County Judge in the General Election held on November 3, 1970.

This is only a Democratic Primary Contested Election case between Collins and Ammerman under Art. 13.30, Tex. Election Code, as to who received the most legal votes. The winner in the contested election was to be certified the Democratic Nominee for the office of County Judge of Harrison County. I cannot find where there has been any violation of any Federal or State law whatever. The U.S. District Court should not have acquired, or assumed, jurisdiction and issued the temporary restraining order. I hope the readers of this opinion will carefully

study the temporary injunction, and read the Federal Statutes cited.

It used to be the law in Texas that when a person would file a Workmen's Compensation Case in State Court and the defendant was a foreign corporation, they would file a petition to remove the case to Federal Court. When this would happen, the State Court lost all jurisdiction it ever had. It is just that simple. There are no Federal Constitutional Provision, United States Statutes or Federal Rules of Procedure that give a single United States District Judge, or any Appellate Federal Court, the power, privilege, right or authority to supervise the trial of a Civil case that is pending in a State Court. If the United States District Court had not acquired, or assumed, jurisdiction, all the issues presented by this appeal would have become moot. This Court would be without any jurisdiction to enter any judgment whatever. Polk vs. Davidson, S. Ct. 1946, 196 S.W. 2d 632; 44 T.L.R. 322 (1965), "A Problem of Appellant Delays in Election Contests." If there had been any violation of any voting rights or any Civil Rights Act and the U.S. Attorney General had certified the facts as required by the Federal Statutes or filed the suit in Federal Court, then it would have taken three Federal Judges to have acquired jurisdiction.

There are some other cases that give a single U.S. District Judge jurisdiction: diversity of citizenship; interstate commerce; labor relations and many others. They are described in detail in Volume(s) 36 and 36A of Corpus Juris Secundum.

There is only one thing that this Court can do: Set aside the judgment of the District Court and remand the

case with instructions to dismiss the contested election case from its docket.

No motion for rehearing will be allowed to be filed.

It is so ordered.

Matt Davis
Associate Justice

March 9, 1971
Filed March 9, 1971

Associate Justice C. L. Ray, Jr., disqualified himself and did not participate in the consideration or decision of this case in any manner whatever.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2298

ROY HUBBARD, ET AL.,
Plaintiffs-Appellees,

JAMES S. COLLINS,
Intervenor-Appellee,

versus

JIM AMMERMAN,
Defendant-Appellant,

and

LONNIE E. HENRY, Clerk of the Court of Civil Appeals for the 6th Supreme Judicial District of Texas,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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(September 6, 1972)

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

COLEMAN, Circuit Judge: This litigation began in the 71st Judicial District of Texas as a local election contest to determine who had received the majority of the votes legally cast in a Democratic primary for the nomination of a candidate for County Judge in Harrison County, Texas.

In the manner hereinafter described, the controversy got into the United States District Court for the Eastern District of Texas. The result was a head-on collision between that Court and the Texas Court of Civil Appeals, with the Federal District Court ultimately deciding this local contest.

For reasons presently to appear, we are of the opinion that the District Court should not have assumed jurisdiction of this controversy.

Its judgment is reversed. The case is remanded with directions that the District Court shall vacate its judgment, dissolve its permanent injunction, and dismiss the case from its docket.

I

The Controversy

In the Democratic Party primary to select a nominee for the office of County Judge of Harrison County, Texas, held May 2, 1970, there were two candidates. One was Jim Ammerman, the incumbent. The other was James S. Collins. After canvassing the election returns, the County Democratic Executive Committee found that Ammerman had received 4,073 votes and Collins had received 4,057 votes. Ammerman, therefore was certified as the Democratic nominee for County Judge.

As authorized by Article 13.30 of the Texas Election Code,[1] Collins instituted an election contest in the 71st

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1. Art. 13.30 Contest of primary nominations

(1) The district court shall have original and exclusive jurisdiction of all contests for nominations growing out of primary elections.

* * *

(3) Any candidate desiring to contest the result of any primary election in which he was a candidate shall file his

Judicial District of Harrison County, praying that the certificate issued to Ammerman be set aside and that Collins be declared the Democratic nominee. Collins alleged that absentee ballots had been illegally cast by mail for his opponent, that other spurious ballots had likewise been cast. This Ammerman denied and counterclaimed that a number of illegal ballots had been cast for Collins by non-residents of the precincts in which they had been allowed to vote.

Footnote continued—

suit in the district court within ten days from the date of canvass of the results of the election by the state executive committee in the case of a state-wide office or a district office in a district which includes territory situated in more than one county, and within ten days from the date of canvass by the county executive committee in the case of a county or precinct office or a district office in a district which consists of only one county or part of one county. Process with a true copy of the petition or complaint attached thereto shall be served upon the opposite party as in other civil suits, except that the return day thereof shall be fixed by the district judge. If the contestee cannot be found within the county in which the contest is filed, service may be had upon the agent or attorney of the contestee, or by leaving the process with some person over the age of sixteen years at the usual place of abode or business of the contestee, or his last address. If service cannot be effected within three days in any of the above methods, service upon the contestee may be had by serving the county clerk in the county where suit is filed, and any candidate who files for a place on the ballot in the primary election shall thereby appoint such county clerk as his agent to receive service for him under the circumstances above set forth. If a candidate for a district office in a district which includes territory situated in more than one county files a contest in one or more counties without filing a contest in every county having territory within the district, the contestee shall have five days from the date of first service of process on him in the suit or suits filed by the contestant, in which to file a contest in such other counties of the district as he may desire to do. In a suit filed by a contestee under the authorization of the preceding sentence, the parties shall be designated, and the suit shall proceed, in the same manner as original contests filed under this Section. Nothing herein shall be construed to prevent the contestee in a pending suit from himself filing a contest as a contestant, within ten days from the applicable date of canvass, in the district court of any county having venue of the contest preceding.

* * *

Subsequently, Collins amended his pleadings to request that a new primary be ordered, asserting that so many illegal votes had been cast that the election should be declared void.

Ammerman contended that under the applicable Texas statute the Court had jurisdiction only to decide the true result of the election as determined by the votes legally cast, a position supported by the prior decisions in *Nesbitt v. Coburn*, 143 S.W.2d 229 (1940) and *Scruggs v. Perkins*, 233 S.W.2d 913 (1950), decisions of the Texas Court of Civil Appeals, which has final jurisdiction of such matters in Texas, Article 13.30(12), Texas Election Code.

Footnote continued—

(4) The filing of the suit shall be immediately called to the attention of the district judge by the clerk of said court. If the district court be then in session, the judge thereof shall set the said contest for trial at a date not more than ten (10) days from the date of the filing of said contest. If the district court be not in session at said time, the judge thereof shall order a special term of said court to be convened not later than ten (10) days from the filing of such contest for the hearing of same, and in either case, the said contest shall have precedence over all other matters.

• • •

(6) The contestee shall file his answer within five (5) days from the filing of such suit, but either party, or both, shall have the right to amend before announcing ready for trial and set up additional causes of action or matters of defense, as the case may be. Any further changes in the pleadings shall be within the sound discretion of the court.

• • •

(9) Upon the trial of said cause, the court shall have full power and authority to hear and determine all matters and things necessary or proper to the determination of such election contest, including the manner of holding the election, any frauds or irregularities in the conduct thereof, or in the making of the returns thereof, illegal votes cast at said election or legal votes prevented from being cast, false calculations, certificates or returns, and to exercise all powers of the court, in order to fully inquire into and ascertain the true and correct result of such election, free from any fraud, irregularity or mistake.

(10) In addition to the powers and authority heretofore granted to the district courts, where fraud or illegality in

After an extended trial which generated a testimonial transcript in excess of 4,000 pages, and despite the appellate decisions just cited, the Texas trial court, on July 27, 1970, entered its judgment setting aside the May 2 primary and ordering a new primary be held for the selection of a Democratic nominee for the office of County Judge.

Footnote continued—

charged, if such charges of fraud or illegality be supported by some evidence, or by affidavit of reputable persons, and the ends of justice seem to require it, the court shall have authority to unseal and reopen the ballot boxes to determine controverted issues, and the court may recount, or under its direction cause to be recounted, the ballots cast in any or all precincts of the county to determine the true result of such election. In all such cases in which a reopening of ballot boxes is ordered, the court shall exercise all due diligence to preserve the secrecy of the ballots, and upon completion of such recount, the said ballot boxes with their original contents shall be resealed and redelivered to the county clerk.

(11) When the District Court shall have decided the contest, unless notice of appeal to the Court of Civil Appeals be given and an appeal bond filed within five (5) days, the said Court shall certify its findings to the officers charged with the duty of providing the official ballot for the ensuing election for observance in the preparation of the ballot for that particular party. The trial Court shall further fix a time within which the record in the trial Court shall be filed in the appellate Court, and make all such other orders in the cause as in his discretion may be necessary and expedient in order to expedite such appeal.

(12) In all contests for party nominations filed in the district courts under authority of this Act, either party thereto may appeal to the Court of Civil Appeals for that particular Supreme Judicial district, which appeal shall be advanced upon the docket of said court and shall have precedence over all other cases. Provided, that no appeal in such cases shall be dismissed as moot merely because of possible interference with the printing of the official ballot unless the appellant has been guilty of negligence in perfecting and prosecuting such appeal, but such appellate court shall retain jurisdiction of such appeal and expeditiously dispose of same. Upon decision of the appeal by the Court of Civil Appeals no motion for rehearing shall be filed except with approval of the court given within three (3) days after such decision. The Supreme Court of Texas shall have no jurisdiction to review any election contest filed under this Act by writ of error, certified question, or any other manner. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 208.

The next step, [Article 13.30(12), Texas Election Code] was an appeal to the Texas Court of Civil Appeals.

Collins had insisted in the District Court that a new election be ordered, but he argued on appeal that he should have been declared the nominee.

Ammerman likewise appealed, contending that the local Texas Court should have decided the winner and was without authority to order a new primary.

The appeals were duly docketed in the Texas Court of Civil Appeals at Texarkana.

To this point, the case was nothing more than an ordinary, often encountered, contest to decide who had received a majority of the legally cast votes for a nomination in a County Democratic primary.

The matter, however, was not allowed to follow the usual course through the Texas state court system.

While the appeals filed by both Collins and Ammerman were pending in the duly designated Texas court of last resort, Roy Hubbard and numerous others, who had not been candidates in the primary, who had no claim to the nomination, on September 10, 1970, filed a complaint in the United States District Court for the Eastern District of Texas, at Marshall.

Some of the complainants if not all of them, had sought to intervene in the Texas District Court case but their intervention had been denied. From this action they did not appeal to the Texas Court of Civil Appeals.

The federal complaint alleged that the plaintiffs had voted in the primary and had voted for James S. Collins. Asserting a class action on behalf of themselves and all others who had voted for Collins, contending that they

were seeking to enforce their rights under the Voting Rights Act of 1964 and 1965, and seeking "to protect their rights of suffrage and of having their votes counted under the provisions of 42 U.S.C.A., §1983(1)", these voters attached a copy of the judgment of the District Court of Harrison County ordering a new election, as well as a transcript of the official proceedings in that Court. It was charged that the ballot boxes had been stuffed with the absentee ballots of persons [Negroes] who, in fact, had not voted those ballots. Further, ballots had been illegally cast wherein the applications for the ballot contained no signature and likewise constituted ballot box stuffing. It was claimed that a majority of all the allegedly illegal votes were cast by or in the name of Negroes, and that this *"action of the supporters of the defendant Ammerman"* constituted preying upon the Negro race, and the illiterates thereof, so as to deprive them of the right to cast a free ballot, on account of their race and color, in contravention of the Voting Rights Acts and the Fifteenth Amendment to the Constitution. It was further alleged that these ballots had been cast in violation of Texas law, that in the state court trial Ammerman had sought to have the ballots of 152 voters declared illegal because they had voted in a precinct where they did not reside, and that to permit the certification of Ammerman as the Democratic nominee would dilute the vote of the complainants and all others who voted for Collins, in violation of the "one person-one vote" rule. It was ultimately alleged that Ammerman was maneuvering to delay the appeal to the Texas Court of Civil Appeals beyond the date when it would be possible to print the general election ballots, thus mooting the contest. These allegations will be subjected to more extensive description *infra*.

It was prayed that the appearance of Jim Ammerman's name on the general election ballot as the nominee

of the Democratic Party be enjoined by the federal district court, *that a new primary election for the nomination of county judge be ordered,* and that no general election for the office of county judge be allowed until such primary could be completed.

The District Court set a hearing for September 25 as to preliminary injunctive and mandatory relief.

Collins was not named as a party plaintiff or defendant to the federal court suit, but Ammerman was made a defendant. Ammerman filed a motion to dismiss the complaint on the ground that on its face the action (1) had been prematurely instituted; that (2) it raised no substantial federal question; that (3) the judgment of the Texas district court was not a final judgment because of the pending appeals to the Texas Court of Civil Appeals; that (4) in his Texas appeal James S. Collins had contended that a judgment should be rendered declaring him to be the nominee; that (5) the defendant Ammerman had contended in the appellate court that the district court erred in ordering a new election; that (6) the complaint constituted an effort to have the United States District Court review as an appellate court, the action of the state court with reference to the election contest; and that (7) the district court was without jurisdiction of the cause. Ammerman also filed an answer reiterating the factual basis upon which it was contended that he had won the primary.

On September 29, 1970, the United States District Court denied the motion to dismiss and granted a preliminary injunction, saying that from an examination of the opinion of the state district court and from evidence presented at the hearing, "it appears that there is the *possibility* that *fraud* has so permeated the Democratic Party for the office of County Judge of Harrison County,

Texas, that the votes of persons who cast legal ballots *may have been* diluted. * * * * There is also a *distinct possibilty* that a decision [of the case] on an appeal that has been taken to the Court of Civil Appeals *may not* be disposed of until after said Cause has become moot". [Emphasis added].

On these premises, the United States District Court did not order a new primary but, until further ordered, unconditionally enjoined the appearance of Ammerman's name on the general election ballot as a Democratic nominee, enjoined the Harrison County Election Board from providing any election supplies for use in the general election for county judge, and enjoined the holding of a general election for the office of county judge. Moreover, "every voter and elector participating in the general election to be held in November, 1970, (although not parties to the litigation) were enjoined from writing in a name for the office of county judge on the general election ballot". Additionally, "all election clerks and judges" were enjoined from counting or returning such write-in votes. A copy of the order granting the preliminary injunction will be annexed to this opinion as Appendix A.

On October 6, 1970, unaware of the federal district court injunction, the Texas Court of Civil Appeals heard oral argument and, the same day, decided the appeals taken to that Court by Collins and Ammerman [*Collins v. Ammerman*, 459 S.W.2d 891]. The Texas appellate court recited the history of the litigation and held that the state trial court should have decided which ballots were legal, which were illegal, who received the most of the votes legally cast, and who had been nominated. It further held that it could not, on the record before it, decide the case on the merits because the state district court had

erroneously denied Ammerman the opportunity to introduce evidence of certain votes cast illegally against him.

The case was remanded to the state district court with directions [on the basis of the record already compiled and on such additional evidence as might be necessary] to decide the contest before October 13, 1970. The Court of Civil Appeals specifically directed that no petition for rehearing would be entertained, that the mandate of the court would issue instanter, and that the Clerk should without delay furnish the trial court with a copy of the opinion, etc.

The trial court proceeded immediately to retry the case and six days after the decision of the Court of Civil Appeals entered judgment that Collins had won the Democratic primary for county judge by a margin of fifteen votes. Acting in accordance with the mandate of the Court of Civil Appeals the district court also entered judgment against Collins and his sureties for the costs of the first trial. Ammerman was taxed with the costs of the second trial.

Ammerman then appealed this judgment [dated October 12, 1970]. Collins also appealed that part of the judgment which had taxed him with the costs of the first trial as directed by the Texas Court of Civil Appeals.

Then came a period in which the United States District Court took no action, the Texas Court of Civil Appeals rendered no decision, the date of the general election passed, there was no election for county judge, and matters remained status quo until March 9, 1971.

On that date [*Ammerman v. Collins*, 464 S.W.2d 184], the Texas Court of Civil Appeals, in a formal opinion, stated that at the time of its prior decision it had not been

apprised of the federal injunction. It then proceeded to set aside the state district court judgment of October 12 on the ground that the United States District Court had acquired or assumed jurisdiction over the controversy by its preliminary injunction of September 29 and that, in any event, under Texas law, the contest not having been finally decided before the general election, the case was moot. The Texas district court was directed to dismiss the contested election case from its docket.

The March, 1971, decision of the Court of Civil Appeals started the wheels turning again at the United States Courthouse. Collins, the contestant in the state courts, moved to be allowed to intervene in the Federal Court case as one having a vital interest in the subject matter of the case, both as a voter and as the legal nominee for the office of county judge. March 19, 1971, the motion was granted and Collins filed his plea of intervention the same day.

We consider it unnecessary to detail the other skirmishing and maneuvering except to say that the case was sent to trial on the merits in the Federal District Court on April 21, 1971.

On May 27, 1971, the District Court filed findings of fact and conclusions of law, followed by a sweeping injunction.

It will be remembered that a total of 8,130 votes were purportedly cast in the Democratic primary. *Adopting* the findings of the state district court, the United States District Judge held that fifty-five absentee ballots were illegally cast, all by Negroes except six; that at least two of these Negroes upon going to the polls to vote in person were denied the right to vote because they, unknown to them, had been voted by absentee ballot; that the casting of absentee ballots in this fashion constituted an infringe-

ment on and a discrimination against the right of these Negroes to vote by reason of their race and color; that this operated to "dilute the vote of each elector who voted for Collins in such a way as to cause Ammerman to be the apparent winner of the primary election".

In paragraph 35, the District Court found as a fact "that the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, made a studied and deliberate attempt to avoid deciding the election contest case on its merits prior to the date of the holding of the General Election on November 3, 1970, so as to be able to declare the election contest moot, and thus avoid deciding the case on its merits".

It was held, as a matter of law, that the mootness doctrine, a part of the law of Texas by enunciation in *Polk v. Davidson*, 145 Tex. 200, 196 S.W.2d 632 (1946), and subsequent cases as applied by the Texas Court of Civil Appeals, is unconstitutional; that members of the Negro race who did not apply for absentee ballots and who had absentee ballots voted in their name by other persons were denied their right to vote and the same was abridged by state action on account of race; that the district court had the right to order a general election with the name of Collins on the ballot; that the district court in aid of its jurisdiction previously exercised could enjoin the enforcement of the judgment and mandate of the Court of Civil Appeals dismissing the election contest; that because of 42 U.S.C.A., §1983 the Anti-Injunction Act [28 U.S.CA.. §2283] did not apply; that since the Court of Civil Appeals did not have jurisdiction to hear the first appeal it did not have jurisdiction to assess costs against Collins; that Collins should be declared the winner of the primary of May 2, 1970. Judgment was accordingly entered, it being directed that no name but that of Collins should

be placed on the general election ballot as a candidate for county judge [Transcript, 233]. In other words, the United States District Court, by its judgment, in effect, named Collins as the County Judge of Harrison County.

The judgment of the District Court was stayed by this Court, pending appeal.

II

Some Preliminary Observations

On February 15, 1972, the Supreme Court of the United States decided *Roundebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, ... L.Ed.2d ..... The case involved a contest (recount) of the certified general election results in the race for United States Senator from Indiana.

The Democratic nominee had been certified. In the appropriate state court the Republican nominee filed a timely petition for a recount. In accordance with Indiana law, the Court appointed a three-man recount commission and directed it to begin the recount on December 8. The Democratic nominee then sought, in the United States District Court, to enjoin the recount. A district judge issued a temporary restraining order until the matter could be heard and decided by a three-judge United States District Court. The state attorney general intervened. The three-judge district court interlocutorily enjoined the recount, 321 F. Supp. 1370. This was appealed to the Supreme Court.

Since the Senate had seated Hartke without prejudice to the outcome of the appeal, the Supreme Court declined to consider the appeal moot. It held that Article 1, §4 of the United States Constitution specifically empowers the states, in the absence of Congressional enactment, to regulate the conduct of Senatorial elections:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Cushing Senators."

Obviously, a recount is simply an election contest, and the Supreme Court held that "A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Article 1, §4".

Citing *Smiley v. Holm*, 285 U.S. 355 (1932) the Supreme Court defined these broad powers:

> "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." 405 U.S. at 24.

If the States have these broad powers as to the conduct of elections for federal office, *a fortiori* they certainly have them, if they choose to exercise them, as to elections held for state and local offices. Therefore, Texas has the power to control the disposition of contest over elections to its state and local offices.

"The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations

and final elections," *Johnson v. Stevenson*, 5 Cir., 1948, 170 F.2d 108, cert. denied 336 U.S. 904.

It is elementary, of course, that United States District Courts have only such jurisdiction as conferred by an Act of Congress under Article III, §2 of the Constitution. Except for the narrow exception set forth in 28 U.S.C., §1344, (of which, more later) there is no Act of Congress which has conferred upon federal district courts jurisdiction to hear and decide, solely as an election contest, what candidate received a majority of the votes legally cast in an election for state or local office.

Even as to state courts, there is no inherent power to determine election contests, and such can become a judicial function only when, and to the extent, authorized by statute, 26 Am. Jur.2d, Elections, §329, *Johnson v. Stevenson, supra.*

On the other hand, in *Bell v. Southwell*, 5 Cir., 1967, 376 F.2d 569, the Court of Appeals for this Circuit did set aside a local election for Justice of the Peace and ordered that a special election be called to fill the office. The Court made no effort to decide the winner of the election. It voided the election. To use the words of the Court, *Bell* involved gross, spectacular, completely indefensible, state-imposed, state-enforced racial discrimination, with no effective judicial remedy prior to the holding of the election, 376 F.2d at 664. The situation described in such terms was that the *voting lists* for the election were segregated on the basis of race. *Voting booths* were segregated according to race, one booth being for white males, another for white women, and a third for Negroes. A number of qualified Negro women voters were denied the right to cast their ballots in the booth designated for white women. Election officials barred

representatives of the Negro candidate from viewing the voting, while another was physically struck by an election official. Police allowed a large crowd of white males to gather near the polls, thus intimidating Negroes from voting. Women of the Negro race were arrested for refusing to leave the voting booth designated for white women.

The Court said that federal invalidation of a state election [to redress deprivation of the right to vote for racial reasons] is "a drastic, if not staggering" remedy and is "a form of relief to be guardedly exercised", 376 F.2d at 662.

We read the remedy in *Bell* as designed to match the enormity of the deprivations involved. The entire election had been conducted in such an unconstitutional manner as to be void.

Moreover, the Court did not embark on an effort to determine who had received a majority of the votes legally cast in the election, with a resultant declaration as to who won the race.

Interestingly enough, Mrs. Bell, one of the plaintiffs, who brought the federal court action as an original suit, had been a candidate in the disputed election, and it was admitted that there was no way, at the time the suit was filed, to challenge the election in the state courts.

See, also, *Hamer v. Campbell*, a case in which the plaintiffs sought relief prior to the election, 5 Cir., 1966, 358 F.2d 215.

III

The Complaint

Laborious as it may be, we consider it unadvoidably necessary at this point to outline:

Pertinent Portions of the Complaint

III.

"The action of the Complainants is brought both in their own right and on behalf of all other electors who voted for James S. Collins, to enforce their rights under what are commonly called the Voting Rights Act of Congress of 1964 (42 U.S.C.A., §1971, et seq.) and 1965 (42 U.S.C.A., §1973, et seq.), and to protect their rights of suffrage, and of having their votes counted under the provisions of 42 U.S.C.A., §1983, and also to secure equal protection of the laws to their rights of suffrage, which are being denied them at this time, in contravention of Amendments XIV and XV of the United States Constitution. All of which shows jurisdiction in this Court.

VI.

"After the trial in Cause No. 25,400, James S. Collins, vs. Jim Ammerman, in the District Court of Harrison County, Texas, the Court entered Judgment casting out as illegal 55 ballots, and declaring that of these one had been cast for the candidate James S. Collins, one had been lost, and 53 had been cast for the Defendant Ammerman, which changed the result of the election so as to show candidate James S. Collins the winner by 36 votes (J-3, S.T.-37).

VII.

"All of the 53 ballots were illegal, and it is believed and alleged that the same were the result of a concerted effort on the part of those supporting the Defendant Ammerman in said Primary Election to stuff the ballot box with spurious ballots in his favor, but of a certainty the ballots of the 16 persons named in the Court's Finding of Fact No. 6 (S.T.-8) were spurious, and stuffed in the ballot box to swell the apparent vote of the Defendant Ammerman in view of the fact that neither the application or ballot carrier envelope were signed, and the persons did not mark their ballots. This can only mean that someone other than the voter marked these ballots and stuffed them in the box. Indeed, the trial Court found that the 53 votes were obviously manipulated in such a way as to leave no doubt that the votes did not represent the free decision of the voters (J-4); that mental incompetents were voted in this group (J-3).

VIII.

"In addition to, and above those persons named in Finding of Fact No. 6, twenty ballots were cast where the voter failed to sign an application for an absentee ballot by mail, failed to authorized anyone to sign an application for said voter, and each of which voters were physically able to sign such application if they had desired to obtain a ballot (T.S.-4). The Complainants say that this conduct amounted to stuffing of the ballot box with spurious ballots purportedly voted for the Defendant Jim Ammerman by persons supporting said Defendant who procured ballots and voted them in the name of said voters.

IX.

"That all of those 16 voters mentioned in Paragraph VII above are members of the Negro race, as were a vast majority of the 53 voters whose ballots were illegally cast. That the action of the supporters of the defendant Ammerman in preying upon the Negro race, and the illiterates thereof (Finding 9, S.T.-11), so as to deprive them of the right to cast a free ballot, on account of their race and color, violated the federal Voting Rights Acts of 1964 and 1965 and the XV Amendment to the Constitution of the United States of America.

X.

"Aside from the ballot box stuffing above described, all of the 53 votes cast by absentee ballot in favor of the Defendant Ammerman were illegal by reason of flagrant violations of the provisions of the Texas Election Code (Art. 5.05, Vol. 9, V.A.T.S.) setting out the procedure and requirements for absentee voting. Some 14 of the 53 had no physical disability or sickness which would have prevented their attending the polls in person so as to have entitled them to cast an absentee ballot by mail (Finding 4, S.T.-6); some 31 in effect had their ballots voted for them when they were physically able to write and to see, through 'assistance' in the marking of their ballots beyond the answering of the voter's question and naming the candidate (Finding 5, S.T.-7); some 25 failed to mark their ballots before a Notary Public or other person authorized to administer oaths (Finding 7, S.T.-9); the voters' registration card of some 12 did not accompany the application filed in the office of the County Clerk for absentee ballots by mail (Finding 8, S.T.-10); and some 9 were illiterate and failed to affix their marks attested to by two witnesses to the application or to the ballot carrier envelope (Finding 9, S.T.-9).

XII.

"In the election contest suit described, Defendant Ammerman sought to have the ballots of some 152 voters declared illegal by reason of the fact that they had voted in a precinct where they did not reside (S.T.-32), reducing this number to some 109 for his final challenge. On the trial of the contest, and at the conclusion of the offer of testimony by the Plaintiff, the Court entered an order 'freezing the pleading', and stating that the ballot of each voter who voted in a precinct other than that of his residence would be cast out, because illegal under the provisions of Article 2.06 of the Texas Election Code (Vol. 9, V.A.T.S.). The Complainants whose names appear on the indicated list, in their own behalf, and on behalf of all other voters who voted in precincts where they did not reside, show that this law as interpreted by the Court denied each of such voters the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution, in these respects:

"a) In addition to the persons named by the Defendant in the election contest as having voted in a precinct other than that of their residence, the Plaintiff added 83 by his proof (S.T. 30-31), and some 300 residents of Precinct 3 were shown to have voted in Precinct 3A (S.T. 15-28).

"b) On Motion to Reopen the election contest, it was shown that following said Primary Election, and upon recommendation of the Grand Jury, a specially deputized committee had made an examination of the registration list in the office of the Tax Assessor-Collector and discovered that some 1,900 persons eligible to vote in the May 2, 1970, Primary had been registered in and put on the voters list of a precinct where they did not reside,

and that some 700 of such persons had, upon notification, come by the Registrar's office and had their registration cards changed.

"In these circumstances, the selection of some 109 out of some 500 voters who actually voted in a precinct other than that of their residence, and out of some 1,900 who were registered so to do, amounts to a disenfranchise, and a refusal to give to said 109 voters the equal protection of the law through discriminating against them as a small part of a far larger class of voters.

XIII.

"The Complainants who are of the Negro race, in their own right, and on behalf of other members of the Negro race who are affected by the action of the Court described in paragraph XII, show that Defendant Ammerman sought to have the Court discriminate against them by reason of their race or color, in that the vast majority of the voters on said list of 152 voters, were members of the Negro race, who were singled out for challenge on account of their race. [NOTE BY THE COURT: This occurred at the trial of the election contest, not at the election.]

XIV.

The Complainants show that to permit the certification of the name of the Defendant Ammerman as the nominee of the Democratic Party for County Judge of Harrison County, Texas, to remain valid, and to permit the preparation of a printed ballot for the General November Election with said Defendant thereon as the candidate of the Democratic Party for County Judge of Harrison County, Texas, would be to dilute the vote of the Complainants and all other voters who voted for James S. Col-

lins, would violate the 'one person-one vote' rule, and have the consequence of depriving the Complainants and each and every one of said other voters of their rights of suffrage under the Constitution and Laws of the United States. It would result in the appearance of the ballot in the 1970 November General Election of the name of the Defendant Ammerman as the nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, when in truth and in fact the Defendant did not receive a majority of the legal votes cast at said Primary Election (S.T.-37; J-1).

The Prayer for Relief

"b) That the Court enter its mandatory order commanding the Defendants called Second Group, and each of them and their successors in office, to within five days of said order take all steps necessary and proper for the calling of a new primary election in order that the electors of Harrison County, who are members of the Democratic Party, may select the nominee of that Party for the office of County Judge of Harrison County, Texas, and that said Defendants canvass the results of said election and certify the name of the winner thereof as the nominee of the Democratic Party for said office.

"h) That Group One Defendants, and each of them and their respective successors in office be enjoined from ordering, issuing Writs of Election for, and giving notice of a General Election for the office of County Judge of Harrison County, Texas, until the primary election for the nomination of the Democratic candidate for the office of County Judge of Harrison County, Texas, (prayed for in Paragraph b) of this prayer) has been conducted, and the winner thereof certified by the proper election officer of Harrison County, Texas, under the orders of this Court.

"i) That Defendants Glenn Link, N. F. Shivers, K. Harold Brown, Doyle Curry and Jim Ammerman, County Clerk, Sheriff, Chairman of the Harrison County Republican Party, Chairman of the Harrison County Democratic Party and County Judge, respectively, of Harrison County, Texas, individually and in their official capacity as the Harrison County Election Board be enjoined from providing any election supplies to the presiding judges of the official election precincts of Harrison County, Texas, for the General Election for the office of County Judge of Harrison County, Texas until the primary election for the nomination of the Democratic candidate for the office of County Judge of Harrison County, Texas (prayed for in Paragraph b) of this prayer) has been conducted, and the winner thereof certified by the proper election officers of Harrison County, Texas, under the orders of this Court.

"j) And for general relief."

IV

Ammerman's Motion to Dismiss

A. The Jurisdiction of the District Court.

28 U.S.C., §1344 is the only Act of Congress conferring jurisdiction on a United States District Court in a state or local election contest (primary or general) to hear and decide the issue of who has received a majority of the votes legally cast.

That section reads as follows:

> "The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein

it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

"The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by law, to enforce the right of citizens of the United States to vote in all the States."

There were 127 plaintiffs in this federal court action but not one of them claimed that he was entitled to recover possession of any office [or nomination necessarily prerequisite to becoming a candidate for office, see *Smith v. Allwright*, 321 U.S. 649 (1944)]. These 127 plaintiffs, therefore, clearly lacked standing to invoke this statute.

Moreover, the complaint showed on its face that it presented no case in which "the sole question touching title to [the] office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude".

Only two citizens of the Negro race had been denied the right to vote when they presented themselves at the polls. This, however, did not occur because they were black but because absentee ballots in their names were already cast. They simply denied the authenticity of those ballots, a question of state law.

As the complaint alleged, the State Court had already invalidated the fifty-five ballots allegedly cast in an illegal or irregular manner for and on behalf of Negro citizens.

The contest had then turned altogether toward state issues, that is, what to do about counting the votes of those who had voted outside the precinct of their residence, a violation of state law.

The plaintiffs must have understood that they had no case within the terms of 28 U.S.C., §1344, because they did not pray for the remedy which that statute provides. Instead, they asked for a new primary.

We hold that the District Court was clearly without jurisdiction to entertain this election contest under 28 U.S.C., §1344.

B. Federal Court Intervention as to Issues of State Law

Since this local election contest had turned toward the legality of ballots cast outside the precincts of the voter, a violation of Texas law and obviously a state question, and since this issue was to govern the outcome of the contest, we must here point out that Federal Courts do not intervene in state election contests for the purpose of deciding issues of state law, if no federal constitutional question is involved. See *Gilmore v. The Greene County Democratic Party Executive Committee*, 5 Cir., 1966, 370 F.2d 919, 920, in which, with reference to a local election contest, we said:

> "[A] decision by the Alabama Supreme Court as to the meaning of the Alabama statutes dealing with the subject matter of this current appeal will be binding on this court, absent any federal constitutional question."

C. Setting Aside the Election and Ordering a New Primary

Ammerman moved for a dismissal of the complaint on the ground that it raised no substantial federal question.

From what has already been said, the plaintiffs really had no hope of retaining jurisdiction in the United States District Court unless they could present a substantial question under the *Bell v. Southwell* rationale, that is, that election had been conducted in a racially discriminatory manner of such character and magnitude as to render the election void.

The complaint contained no allegation of segregated voting lists, segregated voting booths, denial of poll watching, personal violence, arrests, or physical intimidation, such as prevailed in *Bell*.

The gravamen of the complaint was that sixteen spurious ballots were cast, that absentee ballots had not been covered by signed applications or witnessed as required by Texas law. It was alleged that these ballots were cast by or in the name of Negroes, but it is obvious that these ballots were due to be thrown out, whatever the race of the individual who had cast them or in whose name they had been cast. Before the filing of the action in the United States District Court, the Texas District Court had already invalidated these ballots. As already stated, only two Negroes were physically denied the right to vote, but not on account of their race.

We are thus reminded of our language in *Hamer v. Campbell*, 358 F.2d at 222:

> "This action does not mean that we necessarily would set aside every election in which a substantial number of citizens have been denied the right to vote."

This is especially so, since the complaint charged that the allegedly racially discriminatory activities hereinabove described were violations of the laws of Texas, not countenanced or authorized by the State.

The decisive factor is that in its *findings of fact*, upon which the issuance of the preliminary injunction was based, the District Court made no reference to racial discrimination or to the denial of the franchise to any individual on account of his race. Instead, the Court found only the "possibility of fraud" which might dilute the votes lawfully cast, plus the possibility that the Texas Court of Appeals "might not" act in time to prevent the mootness of the pending appeal from the State District Court.

This leaves only the "dilution" argument, but if the court having jurisdiction eliminates the votes illegally cast then there is no way that such votes can "dilute" those which have been lawfully cast. It necessarily follows that the dilution contention in this case is wholly without merit.

We, therefore, hold that this litigation raised no substantial federal question and for that reason Ammerman's motion to dismiss the complaint should have been granted.

V

The Failure to Make Collins a Party

Collins contended in the state court that a new primary should be ordered. In his appeal to the Texas Court of Appeals he changed his contentions, claiming that the state district court should have found him to be the lawful nominee. He was not a plaintiff and had not been named a defendant in the federal court action.

This brings us to the decision of the Eighth Circuit in *Bynum v. Burns*, 1967, 379 F.2d 22. In that case, the plaintiff-appellant was claiming that she had been discriminatorily denied certification as a candidate in the general election (then past) for the office of Justice of the Peace in Lincoln County, Arkansas. The individual elected in the general election was not made a party to the litigation.

The Eighth Circuit said:

> "Of course, under certain circumstances, upon proof of unconstitutional discrimination, the court has the inherent equitable powers to order an election set aside and require a new election. However, even in an equitable proceeding, the court may not act when all the parties affected are not before the court or are not given the opportunity to be heard." 379 F.2d at 233.

VI

The Conclusion

In summary, under the facts and circumstances of this case, we hold:

1. The District Court had no jurisdiction of this case under the provisions of 28 U.S.C., §1344.

2. The facts alleged in the complaint, *and found as facts by the District Court*, raised no substantial question as to the exercise of jurisdiction under the rationale of *Bell v. Southwell, supra*, and similar cases.

3. The District Court should not have acted when Collins was not a party before the Court.

4. On the face of the complaint, the dilution argument was without merit.

5. The District Court, accordingly, should have dismissed the complaint.

6. We need not reach or discuss the actions taken or the judgment entered the following year in connection with the issuance of the permanent injunction, for which jurisdiction was based on retained jurisdiction.

VII

Epilogue

In the foregoing opinion we have discussed only a portion of the manifold arguments presented by able and diligent counsel for both sides. They have swept the legal floor clean of every particle of dust which might have been of help to themselves or unfavorable to the contentions of the opposition.

Hence, it may be well to note that we did consider the following items:

1. Since all the plaintiffs had voted they had no standing to bring a class action in behalf of any who allegedly had been denied the right to vote, *Hamer v. Campbell*, 5 Cir., 1966, 358 F.2d 215.

2. In the absence of a statute to the contrary, none but a candidate claiming to have been injured by illegalities therein occurring can contest the certified results of an election. No private person can bring such a contest on the pretext of "redressing a public wrong." See *Butler v. Cumming*, 86 S.W.2d 351 (Tex., 1935); *Walker v. Sliger*, 405 S.W.2d 471 (Tenn., 1966); *McLavy v. Martin*, 167 So.2d 615 (La. App., 1964). The Texas Statute, Art. 13.30, provides only for contests by "any candidate".

It is noted that in *Bell v. Southwell, supra*, a defeated candidate was one of the plaintiffs.

3. We have attached no legal significance to "what the Texas Court of Appeals might do", see *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600 (1955).

At any rate, we were of the opinion that the case should be decided on the points discussed in that part of the opinion which precedes the conclusions above announced.

VIII

Result

The judgment of the District Court is reversed. The case is remanded, with directions that the permanent injunction issued on May 27, 1971, shall be dissolved, the judgment below shall be vacated, and the complaint shall in all respects be dismissed.

REVERSED and REMANDED,
With Directions.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CIVIL ACTION NO. 1472

ROY HUBBARD, ET AL.,

v.

JIM AMMERMAN, ET AL.

Filed: Sep. 29, 1970

ORDER GRANTING PRELIMINARY INJUNCTION

The Defendant's, Ammerman, Motion to Dismiss this cause, having been heard before trial on September 25, 1970, was in all things overruled, to which Defendant Ammerman excepted.

Due notice having been given Defendant, the Plaintiffs' request for a Preliminary Injunction was then presented on the same date, and the Court having considered the verified Complaint and all instruments on file as exhibits, as well as having heard testimony from witnesses, and have (having) considered the arguments of counsel and being fully advised in the premises, finds:

That from the opinion of the District Court of Harrison County, Texas, in Cause No. 25,400, James S. Collins v. Jim Ammerman, and evidence presented on this hearing, it appears that there is the possibility that fraud has so permeated the Democratic Primary Election for a nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, as that the votes of persons who cast legal ballots may have been diluted.

There is also a distinct possibility that a decision of said Cause No. 25,400 on an appeal that has been taken to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas sitting at Texarkana, Texas, may not be disposed of until after said Cause has become moot.

The Court is of the opinion that unless Honorable Glenn Link, County Clerk of Harrison County, Texas, be restrained from placing the name of Honorable Jim Ammerman on the ballot for the General Election, as the nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, the appeal of said election contest, No. 25,400, may not be finally determined, and further that the Plaintiffs would suffer irreparable injury unless a Preliminary Injunction be granted.

It is therefore ORDERED, ADJUDGED and DECREED that pending further Order of this Court, the Honorable Glenn Link, County Clerk of Harrison County, Texas, his Deputies, representatives and employees and successors be, and he and they are, hereby restrained and enjoined from printing or causing to appear on the ballot for the General Election of November, 1970, the name of Honorable Jim Ammerman as nominee of the Democratic Party for the office of County Judge of Harrison County, Texas, and from in any way placing anything on said printed ballot which pertains to the Office of County Judge of Harrison County, Texas.

It is also ORDERED, ADJUDGED and DECREED that the Defendants Glenn Link, N. F. Shivers, K. Harold Brown, Doyle Curry and Jim Ammerman, individually and in their official capacities as the Harrison County Election Board, their deputies, representatives, employees and successors, all be and they are hereby restrained and enjoined from providing any election supplies to the pre-

siding judges of the official election precincts of Harrison County, Texas, for the November, 1970, General Election for the office of County Judge of Harrison County, Texas, until further ORDER of this Court, and that said parties individually and in the capacity named be enjoined from holding an election for the office of County Judge of Harrison County, Texas, in the 1970 General Election.

It is further ORDERED, ADJUDGED and DECREED that pending the further order of this Court, each and every voter and elector participating in the General Election to be held in November, 1970, is hereby restrained and enjoined from writing in the name of the office of County Judge of Harrison County, Texas, and the name of any person for such office on the ballot of the General Election of November, 1970, and all election clerks and judges are hereby restrained and enjoined from counting and making any return of write-in votes for such office in said election and the Commissioners Court of Harrison County, Texas, is hereby restrained and enjoined from canvassing any purported returns from said election for such office and from certifying the results of any such returns as to said office.

It is further ORDERED, ADJUDGED and DECREED that this order shall be effective from and after 5:00 P.M., September 25, 1970.

SIGNED and ENTERED this 29th day of September, 1970.

(Signed) Wm. Wayne Justice

United States
District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2298

ROY HUBBARD, ET AL.,
Plaintiffs-Appellees,

JAMES S. COLLINS,
Intervenor-Appellee,

versus

JIM AMMERMAN,
Defendant-Appellant,

and

LONNIE E. HENRY, Clerk of the Court of Civil Appeals for the 6th Supreme Judicial District of Texas,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion September 6, 1972, 5 Cir., 1972, ... F.2d .....).

(October 31, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular

active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

OBSERVATION

A PROBLEM OF APPELLATE DELAYS IN ELECTION CONTESTS

JAMES D. MCKEITHAN*

In the trial of election contests, particularly primary election contests, time is of the essence. The first primary is held on the first Saturday in May and the runoff, if any, on the first Saturday in June.[1] Any primary election contest must be finally determined before the general election in November; the contestant automatically loses his cause if by the time of the general election in November he has failed to secure a final judgment not subject to further appeal.[2]

The Legislature, to meet the problem, has provided that primary election contests must be filed within ten days from the date of canvass, that the case shall be set for trial not more than ten days from date of filing the

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1. TEX. ELECTION CODE ANN. art. 13.03 (1952).

2. Polk v. Davidson, 145 Tex. 200, 196 S.W.2d 632 (1946); Taylor v. Nealon, 132 Tex. 60, 120 S.W.2d 586 (1938); Iles v. Walker, 132 Tex. 6, 120 S.W.2d 418 (1938); Sterling v. Ferguson, 122 Tex. 122, 53 S.W.2d 753 (1932); Rosette v. Reyna, 196 S.W.2d 658 (Tex. Civ. App.—San Antonio 1946, no writ); Anderson v. Aldrich, 120 S.W.2d 605 (Tex. Civ. App.—Galveston 1938, no writ); Cummins v. Democratic Executive Comm. of Lampasas County, 97 S.W.2d 368 (Tex. Civ. App.—Austin 1936, no writ); Oliver v. Freeland, 74 S.W.2d 711 (Tex. Civ. App.—San Antonio 1934, no writ).

contest, that there be no more than one postponement (and it not to exceed five days), that notice of appeal to the court of civil appeals and appeal bond must be filed within five days, that such appeals shall have precedence over all other causes in the court of civil appeals, and that the "Supreme Court of Texas shall have no jurisdiction to review any election contest filed under this Act by writ of error, certified question, or any other manner."[3]

These provisions seem clear. But what does a contestant do in such cases when his opponent appeals anyway by application for writ of error to the Texas Supreme Court, thus preventing the mandate from issuing or the appeal from becoming final? And even after such application for writ of error has been dismissed for want of jurisdiction by the supreme court, what is to prevent further filing of a motion for rehearing of the application? The fact is, as a practical matter, nothing can prevent such action under the present Rules of Civil Procedure in the absence of decisive and rapid determination by the appellate courts, and delay is even then unavoidable.

In *Hinojosa v. Longoria*[4] the canvass of the May 2 primary occurred on May 5 and the election contest was filed May 15. The trial court held that the filing was one day late—that May 15 was eleven, not ten days, after May 5—and dismissed the contest. Contestants appealed to the San Antonio Court of Civil Appeals and filed a motion to advance the cause as provided by article 13.30 of the Texas Election Code. The cause was advanced and oral arguments heard on July 8 (unusually rapid for an appellate court). On July 9, the court of civil appeals reversed the trial court, ruled that the contest had been timely filed, and

3. TEX. ELECTION CODE ANN. art. 13.30 (1952).

4. 381 S.W.2d 140 (Tex. Civ. App.—San Antonio 1964, writ dism'd w.o.j.).

remanded to the trial court for trial on the merits. July 16 was designated as the last day for filing motion for rehearing; contestees' motion for rehearing was overruled on July 22.

But under the Rules of Civil Procedure, mandate could not issue for an additional thirty days.[5] On the twenty-ninth day, contestees filed application for writ of error to the Texas Supreme Court. Contestants immediately filed a motion with the supreme court that the application be denied for want of jurisdiction and a motion with the court of civil appeals that mandate issue forthwith. The San Antonio Court of Civil Appeals refused to issue the mandate on the ground that the application was pending in the supreme court. The supreme court, then being on vacation, did not act until October 7—denying the writ for want of jurisdiction, but failing to specify that no motion for rehearing would be allowed. Mandate still could not issue since rule 484[6] allows fifteen days for filing of motion for rehearing, and it was too late in any event to remand the case to the trial court, complete a trial on the merits, and secure a final determination by the court of civil appeals prior to the November 3 general election (absentee balloting began on October 14).

Possibly at some point a special appearance in the Texas Supreme Court urging some type of immediate remedy would have terminated the appellate process. But it is submitted that such is an undue burden to place on election contestants, and some modification of the Rules of Civil Procedure or practices of the appellate courts is warranted to insure that election contests are not deliberately rendered moot by appeals directly contrary to the

5. Tex. R. Civ. P. 442.
6. Tex. R. Civ. P. 484.

election statutes. The same problem occurs also in general election contests for other than state officers: there the decision of the court of civil appeals is declared to be final except when the validity of a statute is questioned by the decision,[7] or in event of conflict of opinions of courts of civil appeal, or when the judges of the same court of civil appeals disagree upon a question of law material to the decision of the case.[8] Nevertheless, any party may delay by filing application for writ of error to the supreme court within thirty days after final determination by the court of civil appeals, and the only available remedy is the eventual overruling of the application for want of jurisdiction.

In general election contests, the problem is not as acute since the contest is not moot until expiration of the terms of office—usually two or four years—but even this amount of time can be consumed if a new trial is granted and a second appeal thereby necessitated, as happened for example in *Guerra v. Ramirez*.[9] In primary election contests, the problem is most serious, and successful termination of appeal is often impossible, particularly if the case is initially derailed by the trial court as occurred in *Hinojosa v. Longoria*. The specific directive in article 13.30 that the Texas Supreme Court shall have no jurisdiction to review primary election contests is meaningless under present practice and will remain so in the absence of further legislative remedy, an amendment to the Rules of Civil Procedure, or a change in the practices of the appellate courts.

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7. TEX. REV. CIV. STAT. ANN. art. 1821 (1964).

8. Vicars v. Stokely, 157 Tex. 182, 300 S.W.2d 623 (1957).

9. 351 S.W.2d 272 (Tex. Civ. App.—San Antonio 1961, writ dism'd) and 364 S.W.2d 720 (Tex. Civ. App.—San Antonio 1963, writ dism'd).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CIVIL ACTION NO. 1742

ROY HUBBARD, ET AL.,

v.

JIM AMMERMAN, ET AL.

(Filed May 27, 1971)

JUDGMENT

This action came on for trial before the court on April 21, 1971, and the issues have been duly tried and the decision having been duly rendered, it is

ORDERED and ADJUDGED that Honorable John D. Furrh, District Judge of Harrison County, 71st Judicial District of Texas, and his successors in office, be, and they are hereby, permanently restrained and enjoined from setting aside or vacating that certain judgment entered October 12, 1970, in Cause No. 25,400, styled *James S. Collins* v. *Jim Ammerman*, pending in said court, and are further permanently enjoined and restrained from dismissing said cause, or assessing costs therein against the intervenor, James S. Collins, and his bondsmen. It is further ORDERED

That Honorable Jack A. Moore, Clerk of the District Court of Harrison County, Texas, and his successors in office, be, and they are hereby, permanently restrained and enjoined from issuing an execution against the intervenor, James S. Collins, and his bondsmen for costs incurred in

Cause No. 25,400 pending in the District Court of Harrison County, Texas, styled *James S. Collins* v. *Jim Ammerman*, and that they are further permanently restrained and enjoined from issuing execution against the intervenor, James S. Collins, and his bondsmen in Cause Nos. 8012 and 8031 in the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, both such causes being styled *Ammerman* v. *Collins*. It is further

ORDERED that the Honorable Lonnie E. Henry, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, and her successors in office, are hereby permanently restrained and enjoined from issuing a writ of execution against the intervenor, James S. Collins, and his bondsmen, Franklin Jones, Sr., and Earl Sharp, for the collection of any costs incurred in Cause No. 25,400 *James S. Collins* v. *Jim Ammerman*, in the District Court of Harrison County, Texas, and in Cause No. 8012, *James S. Collins, Appellant*, v. *Jim Ammerman, Appellee*, in the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, and in Cause No. 8031, *Jim Ammerman* v. *James S. Collins*, in the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas. It is further

ORDERED and ADJUDGED

(1) The defendants, Jim Ammerman, Z. T. Craver, Fred Metcalf, Sidney Keasler, and Will Power, as the Commissioners' Court of Harrison County, Texas, and the defendants, Jim Ammerman, acting County Judge, Glenn Link, County Clerk, N. F. Shivers, Sheriff, K. Harold Brown, Chairman of the Harrison County Republican Party, and Doyle Curry, Chairman of the Harrison County Democratic Party, and their successors in office, will conduct a special general election in Harrison County, Texas, on Saturday, the 10th day of July, 1971.

(2) The election shall be held for the sole purpose of filling the office of County Judge of Harrison County, Texas, and for no other purpose.

(3) The Democratic Party candidate in the election will be James S. Collins, and no other names shall be placed as candidates on the ballot for the election.

(4) The voting machines employed in the last General Election of November 3, 1970 in Harrison County, Texas will be used as the means of balloting and counting ballots in the election.

(5) The places of voting shall be within the precincts and at the boxes as fixed by the last order of the Commissioners Court of Harrison County, Texas, immediately preceding the date of this judgment, and pursuant to Articles 2.03 and 2.04 of the Election Code of Texas, Vol. 9, V.A.T.S.

(6) The defendant, Jim Ammerman, acting as County Judge, and his successors in office, shall cause notice of the election ordered herein to be given in the form of a news release sent to each newspaper published in Harrison County, Texas, not more than twenty-five days nor less than ten days before the election, and by causing a copy of the notice to be filed with the defendant Glenn Link, County Clerk, and another copy to be posted on a bulletin board in the office of the County Clerk, at least twenty days before the election.

(7) The notice shall state the nature and date of the election, the hours during which the polls will be open, and the location of the polling places in all the precincts in the County, and shall state the office to be filled.

(8) The Defendant, Jim Ammerman, acting County Judge, and his successors in office shall file with the De-

fendant Glenn Link, County Clerk, and his successors in office, a copy of the news release giving notice of the election, together with a list of the newspapers to which it was sent and the date of mailing.

(9) The defendant, Glenn Link, County Clerk, and his successors in office, will within ten days of the date of this order prepare and have ready for use at the election official ballots or forms to be used in the voting machines, as well as absentee ballots to be used in the election.

(10) The defendants named in paragraph (1) above will furnish voting booths, voting machines, ballots, and all articles and materials applicable to the election as provided by Chapter 7, Art. 7.01 through 7.17, as amended, of the Texas Election Code, Vol. 9, V.A.T.A.

(11) The election officers appointed by the defendant Commissioners' Court at its July, 1970, term will serve as officers of the election pursuant to the applicable provisions of Chapter 3, Arts. 3.01-3.09a of the Texas Election Code as amended, Vol. 9, V.A.T.S., and the defendants named in paragraph (1) above are authorized to take all action contemplated by said Chapter 3 in the event of necessary changes of or addition to the officers of the election.

(12) The defendants named in Paragraph (1) above will provide all facilities and take all steps necessary to bring about absentee voting as provided for in Art. 5.05 and other applicable provisions of the Texas Election Code as amended, Vol. 9, V.A.T.S.

(13) The election will be conducted, and the returns canvassed in accordance with the applicable provisions of Chapters 7 and 8, Arts. 7.01—8.46 of the Election Code of Texas, as amended, Vol. 9, V.A.T.S., under the supervision and control of the defendants named in Paragraph (1)

above. The defendant Commissioners' Court shall convene on the Monday next following the day of the election, or sooner, shall open the election returns and canvass the result, recording the state of the polls in each precinct in a book to be kept for that purpose, and after this canvass of the result of the election has been made, the defendant Jim Ammerman, acting County Judge, shall deliver to the candidate for whom the greatest number of votes have been polled for the office of Judge of the County Court of Harrison County, Texas, for the term beginning January 1, 1971, a certificate of election, naming therein the office and terms to which said candidate has been elected, the number of votes polled for him, and the day on which such election was held, and shall sign the same and cause the seal of the County Court to be imposed thereon, and then deliver the certificate to such winning candidate.

(14) In all other respects the defendants named in Paragraph (1) above shall conduct the election in accordance with the election laws of the State of Texas and the applicable United States statutes.

(15) This court retains jurisdiction until the election has been held, the votes cast, properly counted and canvassed, and the winner of such election properly certified and inducted into office, and for such other purposes as justice may require.

(16) Provided that, if an appeal is taken by defendant Ammerman from this judgment, the holding of the special general election shall be stayed during the pendency of said appeal, upon the filing by Ammerman of a good and sufficient bond in the sum of $15,000.00, subject to approval by the United States District Clerk for the Eastern District of Texas. The conditions of said bond shall be that, if defendant Ammerman is unsuccessful in

prosecuting his appeal and if intervenor Collins is elected to the office of County Judge of Harrison County, Ammerman and the surety or sureties on his bond shall be liable to Collins for all damages suffered or incurred by intervenor as a result of and during the pendency of defendant's appeal.

SIGNED and ENTERED this 27th day of May, 1971.

/s/ Wm. Wayne Justice
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2298

D. C. Docket No. CA 1472

ROY HUBBARD, ET AL.,
Plaintiffs-Appellees,

JAMES S. COLLINS,
Intervenor-Appellee,

versus

JIM AMMERMAN,
Defendant-Appellant,

and

LONNIE E. HENRY, Clerk of the Court of Civil Appeals for the 6th Supreme Judicial District of Texas,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions that the permanent injunction issued on May 27, 1971, shall be dissolved, the judgment below shall be vacated, and the complaint shall in all respects be dismissed, in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees and intervenor-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

September 6, 1972

Issued as Mandate:

(Motion for Reduction of Security and for Stay Pending in Supreme Court and Circuit Court)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2298

ROY HUBBARD, ET AL.,
Plaintiffs-Appellees,
JAMES S. COLLINS,
Intervenor-Appellee,
vs.
JIM AMMERMAN,
Defendant-Appellant,
and
LONNIE E. HENRY, Clerk of the Court of Civil Appeals for the 6th Supreme Judicial District of Texas,
Defendant-Appellant.

(Filed November 14, 1972)

ON CONSIDERATION OF THE APPLICATION of the plaintiffs-appellees and intervenor-appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable plaintiffs-appellees and intervenor-appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of ninety days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within ninety days from the date of this order there shall

be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of ninety days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

This stay is granted upon the express condition precedent that the intervenor-appellee shall first give bond, with adequate security, to be approved by the clerk of this Court, in the penal sum of ten thousand dollars ($10,000), conditioned according to law, specifically to insure the payment by the said intervenor-appellee of all costs which have to date accrued in this litigation in both the state and federal courts if the petition for the writ of certiorari is denied or if the judgment of the Circuit Court of Appeals is affirmed by the Supreme Court.

This November 14, 1972.

/s/ Jas. P. Coleman
United States Circuit Judge

FILE COPY

FILED
DEC 29 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-834

ROY HUBBARD, ET AL.,
Petitioners,

VS.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-834

ROY HUBBARD, ET AL.,
Petitioners,

vs.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

TO SAID HONORABLE COURT:

The Court of Appeals correctly held that the United States District Court should not have enjoined the enforcement of final judgments which had been rendered by state courts adverse to Collins and his supporters in a primary election contest filed by Collins in a Texas court pursuant to a Texas statute. The factual background of the controversy is fully stated in the opinion of the Court of Appeals, Appendix pp. 37-69.

JURISDICTIONAL QUESTIONS RAISED

1. Can a party who instituted a state court proceeding and who suffered two adverse judgments in the highest state court having jurisdiction of that proceeding forego his right to have those judgments reviewed by certiorari under 28 U.S.C., § 1257 and instead obtain an injunction against the enforcement of such judgments in an independent action in a United States District Court?

2. Can, or should, the Supreme Court review such state court judgments which were rendered on October 6, 1970 and March 9, 1971 and which the petitioners allowed to become final?

HISTORY OF THIS LITIGATION

Before any action was commenced in a federal court, Collins filed and tried a primary election contest in a Texas court under provisions of the Texas Election Code.[1] In the trial of the contest in the state court, numerous errors were committed by the state trial court at the urging and insistence of Collins, and over the objection of Ammerman, and, at the urging, prayer and insistence of Collins, the state trial court ordered a new primary election, even though it had no authority to do so under state law.[2] Collins and Ammerman perfected timely appeals from such judgment to the Texas Court of Civil Appeals at Texarkana,

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1. Article 13.30 of the Texas Election Code, which is quoted in full in the opinion of the Court of Appeals, Appendix pp. 38-41.

2. This was so held by the Texas Court of Civil Appeals, *Collins v. Ammerman*, 459 S.W.2d 891, 894 (Texarkana Civ. App. 1970); Defendants' Exhibit 2, Transcript of Hearing on Permanent Injunction, pp. 50-53; Appendix in Court of Appeals, p. 25.

with Collins changing his position on appeal and contending that the state trial court should have declared him the winner rather than ordering a new election.[3] Collins' supporters (who later filed the action in the United States District Court) intervened in the election contest, were ordered stricken by the state trial court, and did not appeal from that order or the subsequent decision of the state trial court.

In an opinion rendered on October 6, 1970, the state appellate court entered judgment adverse to Collins, taxed the cost of the trial and appeals against Collins, and remanded the contest to the state trial court for further proceedings.[4]

After further proceedings in the state trial court, which resulted in a judgment favorable to Collins except as to taxation of costs in accordance with the earlier decision of the state appellate court, both Collins and Ammerman perfected new appeals to the Texas Court of Civil Appeals, which, on March 9, 1971, rendered judgment dismissing the contest and taxing the costs against Collins.[5] Contrary to Collins' claim of irregularities in the election, *such judgment expressly found that there was no violation of any federal or state law*[6] and left in force Ammerman's certification as the Democratic nominee for County Judge of Harrison County, Texas.

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3. This was emphasized by the Court of Appeals in its opinion, Appendix, p. 42.

4. *Collins* v. *Ammerman*, 459 S.W.2d 891 (Texarkana Civ. App. 1970); Appendix in Court of Appeals, p. 25.

5. *Ammerman* v. *Collins*, 464 S.W.2d 184 (Texarkana Civ. App. 1971); Appendix, p. 26.

6. *Ammerman* v. *Collins*, 464 S.W.2d 184, 189 (Texarkana Civ. App. 1971); Appendix, p. 34.

On both appeals to the Court of Civil Appeals, Ammerman argued that the state trial court had erroneously declared void 31 absentee ballots for Ammerman for non-substantial reasons, such as the rendition of needed assistance to illiterate voters (Appendix in Court of Appeals, p. 21, and p. 42). These 31 ballots were legal under prior court decisions and, although these ballots were not expressly discussed in the opinion of the Court of Civil Appeals, the finding that there was no violation of any federal or state law was an implied adjudication in favor of Ammerman. Therefore, Ammerman contends that he was still the winner of the election by a majority of 16 votes.

Neither Collins nor the sureties on his appeal bonds in the state courts, nor his supporters who intervened in the contest and later filed this action, petitioned the Supreme Court of the United States for a writ of certiorari to review such state court judgments as allowed by 28 U.S.C., § 1257. Instead, Collins and his supporters prosecuted an independent action in the United States District Court to set aside and enjoin the enforcement of such judgments.[7]

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7. Roy Hubbard et al., plaintiffs, and James S. Collins, Intervenor vs. Jim Ammerman, et al., defendants, Civil Action No. 1472, in the United States District Court for the Eastern District of Texas, Marshall Division. The judgment of that action, granting the relief sought by Collins and his supporters (Appendix, pp. 75-80) was reversed by the judgment of the Court of Appeals (Appendix, pp. 81-82) complained of by petitioners in their Petition for Writ of Certiorari.

REASONS FOR REFUSING THE WRIT

Petitioners Are Bound by the Judgments of the State Appellate Court

The October 6, 1970 and March 9, 1971 judgments of the Texas Court of Civil Appeals were final judgments of the highest court of the State of Texas having jurisdiction of the primary election contest filed by Collins. *Parr* v. *Cantu*, 161 Tex. 296, 340 S.W.2d 481 (1961).[8] The remedy that Collins and his sureties, as well as his supporters who had intervened in the contest in the state court, should have pursued if they desired a federal review of the state court proceedings was that provided by 28 U.S.C., § 1257.

Lower federal courts possess no power whatsoever to sit in direct review of state court decisions. *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng.*, 398 U.S. 281 (1970). Judgments of state courts may be reviewed or nullified only by the Supreme Court of the United States and not by federal district courts. *Essanay Film Mfg. Co.* v. *Kane*, 258 U.S. 358 (1922); *Warriner* v. *Fink*, 307 F.2d 933 (5th Cir. 1962), cert. den., 372 U.S. 943 (1963); *Hanna* v. *Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960), cert. den., 365 U.S. 838 (1961); *Jones* v. *Medlock*, 180 F.2d 658 (10th Cir. 1950), cert. den., 340 U.S. 819 (1950).

Having failed to file a petition for writ of certiorari for review of the state court judgments, Collins, his sureties, and his supporters allowed such judgments (taxing Collins and his sureties with the costs in the state courts and leaving the certification of Ammerman in force) to be-

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8. Art. 13.30 (12) of the Texas Election Code provides: "The Supreme Court of Texas shall have no jurisdiction to review any election contest filed under this Act by writ of error, certified question, or any other manner."

come final. They are now bound by such judgments under federal law as well as the law of the State of Texas.

The State Court Proceedings Should Not Have Been Enjoined

The Order Granting Preliminary Injunction entered by the United States District Court on September 29, 1970 enjoined the state election officials from holding an election for the office of County Judge of Harrison County, Texas "until further Order of this Court" and enjoined "each and every voter and elector participating in the General Election to be held in November, 1970 - - - from writing in the name of the office of County Judge of Harrison County, Texas, and the name of any person for such office on the ballot of the General Election of November, 1970." (Appendix, pp. 30-31). The broad scope of this preliminary injunction, as well as the subsequent injunctions issued by the United States District Court, was calculated to deprive the state courts of the power and means of enforcing any final judgment which they might render in the election contest and resulted in the "head-on collision" between the United States District Court and the Texas Court of Civil Appeals described in the opinion of the Court of Appeals (Appendix, p. 38). The permanent injunction against enforcement of the judgments of the Court of Civil Appeals is without precedent so far as we can determine.

In *Mitchum* v. *Foster*, ... U.S. ....., 32 L.Ed.2d 705 (1972) the Court restated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances", previously declared in *Younger* v. *Harris*, 401 U.S. 37 (1971), and emphasized:

> *"we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.* These principles, in the context of state criminal prosecutions, were canvassed at length last term in Younger v. Harris, 401 U.S. 37, and its companion cases. These are principles that have been emphasized by this Court many times in the past." (Emphasis added, numerous cited cases omitted)

The principles of equity do not entitle a litigant to injunctive relief from a judgment if he has failed to exhaust every legal remedy available to him.[9] In this case, the record affirmatively shows the petitioners failed to pursue or exhaust the legal remedy afforded them by 28 U.S.C., § 1257;[10] therefore, even absent other considerations dictating against the issuance of an injunction, the petitioners failed to establish any basis for injunctive relief from the state court judgments.

The injunctions, if intended to avoid application of the "mootness doctrine" prescribed by Article 13.30 (12) of the Texas Election Code, were improperly granted because 28 U.S.C., § 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the

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9. No citation seems necessary for this basic rule of equity but numerous cases are cited in 49 C.J.S., § 343.

10. Transcript of Hearing on Permanent Injunction, p. 52.

ground of the unconstitutionality of such statute *unless the application therefor is heard and determined by a district court of three judges* under section 2284 of this title." (Emphasis added)

Only one judge heard and determined the applications for the injunctions.

Ammerman Was Not Bound by the Erroneous Findings of the State Trial Court

Contrary to the conclusion of the United States District Court that Ammerman was collaterally estopped by some of the findings of the state trial court, the judgments of the state trial court, entered on July 27 and October 12, 1970, were rendered of no force and effect by timely appeals therefrom which were perfected by both Collins and Ammerman. Whether the judgment of a state court is final, conclusive or binding must be determined by the law of the state under whose jurisdiction such judgment was rendered and the law of the State under whose jurisdiction a judgment was rendered is binding upon federal courts as to the status of a state court judgment with respect to its finality pending or following an appeal therefrom. *Ray* v. *Hasley,* 214 F.2d 366 (5th Cir. 1954); *Silent Automatic Sales Corp.* v. *Stayton,* 45 F.2d 476 (8th Cir. 1931); and *Coppedge* v. *Clinton,* 72 F.2d 531 (10th Cir. 1934). Under numerous decisions of the courts of the State of Texas, the judgment rendered by the trial court in a primary election contest is of no force and effect, confers no right, and is unenforceable if a timely appeal is perfected, until and unless it is affirmed on appeal. *Thomason* v. *Seale,* 122 Tex. 160, 53 S.W.2d 764 (1932); *Taylor* v. *Nealon,* 132 Tex. 60, 120 S.W.2d 586 (1938); *Polk* v. *Davidson,* 145 Tex. 200, 196 S.W. 2d 632 (1946); *Iles* v. *Walker,* 132 Tex. 6, 120 S.W.2d 418

(1938); *Sterling* v. *Ferguson*, 122 Tex. 122, 53 S.W.2d 753 (1932); and *Benavides* v. *Atkins*, 132 Tex. 1, 120 S.W.2d 415 (1938).

The Claim That Ammerman's Counsel Stipulated on Jurisdiction

At page 5 of their Petition for Writ of Certiorari, petitioners apparently argue that Ammerman's counsel agreed or stipulated that the United States District Court had jurisdiction to enjoin the holding of the General Election. The Appendix Accompanying Petition for Certiorari (prepared solely at the request of petitioners) does not contain a full transcript of the Hearing on Motion to Dissolve Preliminary Injunction. The record in this entire proceeding, including Ammerman's Motion to Dismiss (R. pp. 27-29), Ammerman's Original Answer (R. pp. 30-47), Ammerman's Original Answer to Collins' Plea of Intervention (R. pp. 148-157), and the Pre-Trial Order in the United States District Court (Appendix in the Court of Appeals, pp. 88-117), as well as the transcript of all of the hearings in the District Court will show, without question, that at all times Ammerman consistently maintained the position that the District Court had no jurisdiction to issue an injunction or grant the relief prayed for by the original plaintiffs or the intervenor.

The import of and the point conveyed by the statement of Ammerman's counsel quoted by petitioners is that *if* the United States District Court had jurisdiction, which Ammerman denied, it would not lose jurisdiction by denying plaintiffs' motion on October 13, 1970.

CONCLUSION

The Petition for Writ of Certiorari filed with the Court for review of the judgment of the United States Court of Appeals is a belated and unauthorized attempt to obtain a review of the judgments of the state appellate court, which were final and no longer reviewable more than a year before the filing of such petition.

Had the petitioners desired to challenge the constitutionality of the "mootness doctrine", they should have pursued the remedy afforded to them by 28 U.S.C., § 1257. It is not reviewable in this proceeding.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Petition for Writ of Certiorari was this the ..... day of December, 1972, placed in the United States Mail, postage prepaid to Mr. Earl Sharp, P. O. Box 3106, Longview, Texas 75601, Mr. Franklin Jones, P. O. Drawer 1249, Marshall, Texas 75670, Attorneys of Record for Petitioners, and Mr. Austin C. Bray, Jr., Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-834

ROY HUBBARD, ET AL.,
Petitioners,

vs.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

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In the Supreme Court of the United States

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No. 72-834

ROY HUBBARD, ET AL.,
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vs.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

TO SAID HONORABLE COURT:

This reply is addressed to arguments first raised in the brief in opposition to the petition. In general, we follow the topical arrangement in the opposition brief.

"HISTORY OF THIS LITIGATION"

Collins would have been satisfied with the termination of the election contest by the holding of a new primary election, as evidenced by his unsuccessful effort in the Texarkana Appeals Court to mandamus the Democratic Executive Committee to carry out the State Court judgment ordering the new election (App. 4 and 14). Ammerman procured an order from the State Trial Court fixing the time for preparation of the transcript and statement of facts as October 10, 1970 (Pls. Exh. 3, pp. 150-153), three days later than the deadline for ordering printed ballots for the general election (App. 14-15). Thereafter, he vigorously and successfully opposed efforts of counsel for Collins to shorten the time for preparation of the record and disposition of the appeal (Pls. Exh. 67). It was only after Collins realized that Ammerman intended to force procedural delays to bring into play the malodorous "mootness doctrine" (Pet. For Writ, p. 4, App. pp. 71-74) that he sought to shorten disposition of the case in the appellate court by bringing the case up through an alternative route of appeal.[1] He was thwarted in this effort through the studied and deliberate attempt of the Texarkana Appeals Court to avoid deciding the election contest case on its merits prior to the date of holding the

1. Texas Rule of Civil Procedure 307: "In non-jury cases, where findings of fact and conclusions of law are requested and filed, and in jury cases, where a special verdict is returned, any party claiming that the findings of the court or the jury, as the case may be, do not support the judgment, may have noted in the record an exception to said judgment and thereupon take an appeal or writ of error, where such writ is allowed, *without a statement of facts* or further exceptions in the transcript, but the transcript in such cases shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereon (emphasis supplied)." See *Ward v. Scarborough*, (Comm. of App. of Texas, Op. adopted by Supreme Court Jan. 11, 1922), 236 S. W. 441.

general election, so as to be able to declare the election contest moot (F.F. ¶35, App. 18).

Respondents suggest (Reply 3) that the Texarkana Appeals Court passed upon the merits of the election contest by the use of this language: "I cannot find where there has been any violation of any Federal or State law whatever." (App. 34). The remark was *obiter dictum*, all the more so since the Court expressly found and decided that no Texas court had jurisdiction to act on the case after the granting of the September 29, 1970 preliminary injunction. Furthermore, it is manifest that the Texarkana Court made no examination of the record on the trial in the State District Court, and simply ordered dismissal for lack of jurisdiction. Lastly, the State Court paid no homage to the Fourteenth Amendment or 42 U.S.C., §1983 and the many cases decided under them. This is understandable, since no part of the record made in the District Court in this case was before the Texas court other than a copy of the preliminary injunction.

It is true that Collins did not seek writ of certiorari from the last Texarkana decision. It is also true that the would-be Intervenors in the election contest decided to have no more of the Texas practice after their plea was denied. Neither the trial nor Texas Appellate Courts made any effort to dispose of the constitutional questions raised in this case, nor were any of them presented to the Appellate Court.

"PETITIONERS ARE BOUND BY THE JUDGMENT OF THE STATE APPELLATE COURT"

This Court specifically held that the *Atlantic Coastline* decision[2] did not apply to a 42 U.S.C., §1983 case in *Mitchum* v. *Foster* (32 L. Ed. 705, 709). Our case is governed by the decision in *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461. Under the abstention doctrine a three judge Federal Court there stayed proceedings until the Courts of Louisiana had an opportunity to determine the issues. Following an adverse judgment in Louisiana on *all* issues, the plaintiffs returned to the Federal District Court to be met with a dismissal because "the proper remedy was by an appeal to the Supreme Court of the United States" (375 U.S. 414, 11 L. Ed. 2d 444). This Court reversed, because such review "is an inadequate substitute for the initial district court determination" (375 U.S. 416, 11 L. Ed. 2d 445). Among the reasons for the holding was that a litigant may not be unwillingly deprived of a primary fact determination in his case by a federal district court, and, to quote:

> "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts. We made this clear only last Term in NAACP v Button, supra, 371 US at 427, 9 L ed 2d at 414, when we said that 'a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim'." (375 U.S. 417, 11 L. Ed. 2d 446).

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2. *Atlantic Coastline RR.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739.

It is only where "* * * a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, *and has them decided there,* * * *" (emphasis supplied), that it may be said he has elected to forego his rights to return to the district court in an abstention case (*England,* 375 U.S. 419, 11 L. Ed. 2d 447). Respondents do not even attempt to show such an election by the Petitioners, nor could they successfully do so.

"THE STATE COURT PROCEEDINGS SHOULD NOT HAVE BEEN ENJOINED"

The complaint was filed September 10, 1970 (App. 15) after the Petitioners had been denied the opportunity of urging their federal and constitutional rights in the state court (Pls. Exh. 61, p. 108), and after the deliberate attempt of a Texarkana Appeals Court to avoid decision of the case until the contest should become moot had become apparent (App. F.F. XV, p. 5; F.F. 35, App. 18). We do not restate the obvious principles of equity on which the trial court based the preliminary injunction, but refer to the Petition for Writ of Certiorari, pages 14-15.

The language quoted by Respondents (Reply 6) that enjoined voters from writing in the name of the office of County Judge of Harrison County, Texas at the general election was placed in the preliminary order at the request of Respondent Ammerman. We counter the statement of Respondents that the preliminary order was calculated to deprive the state courts of the power of enforcing any final judgment with the obvious reply that the Federal District Court primarily sought to preserve the status quo long enough for the State Courts to make a final and meaningful decision in the election contest. His willingness to

accept such a decision is found in his final action of enforcing the only judgment on the merits entered in the State Court proceedings, by way of applying collateral estoppel to Respondent Ammerman.

The *England* case (pages 4-5, supra) makes wholly untenable Respondents' suggestion that the Petitioners failed to exhaust legal remedies available to them. However, any sort of delay is not to be countenanced in cases involving such a strong national interest as the right to vote (*Harman* v. *Forssenius,* 380 U.S. 528, 537, 14 L. Ed. 2d 50, 57).

No attack was made by Petitioners on the proviso of the Texas Election Code referring to mootness,[3] as suggested by Respondent (Reply 7). Petitioners' complaint has always been at the unconstitutional emasculation of the plain language of the Legislature by the semantic gymnastics of the Texas Court in *Polk* v. *Davidson* (Tex. Sup. 1946), 196 S. W. 2d 632. Section 2281 of Title 28, U.S.C. has no application, since the Texas statute was not challenged on constitutional grounds (*Phillips* v. *United States,* 312 U.S. 246, 252, 85 L. Ed. 800, 805).

"AMMERMAN WAS NOT BOUND BY THE ERRONEOUS FINDINGS OF THE STATE TRIAL COURT"

The findings were not erroneous. The State Trial Court filed extensive findings of fact and conclusions of law, both after the July 27, 1970 judgment (Pls. Exh. 62), and the October 12, 1970 judgment (Pls. Exh. 61, pp. 21-

3. Provided, that no appeal in such cases shall be dismissed as moot merely because of possible interference with the printing of the official ballot unless the appellant has been guilty of negligence in perfecting and prosecuting such appeal, but such appellate court shall retain jurisdiction of such appeal and expeditiously dispose of same (Tex. St. Art. 13.30(12), f.n. App. 41).

49). A thirteen volume statement of facts was made on the first trial, and accepted on the second trial (Pls. Exh. 61, p. 50). The statement of facts and all other instruments in the state proceeding were in evidence before the Federal District Judge, and amply sustained all of his findings.

The District Court concluded that the findings of fact and conclusions of law made by the State Trial Judge in support of his opinion and judgment of July 27, 1970 were the result of full litigation between Collins and Ammerman on the issues determined therein (App. 21). Further, that since those with respect to absentee votes thrown out had been challenged by Ammerman in the Texarkana Appeals Court, but not disputed by it, Ammerman could not later complain that the findings and conclusions did not determine the legality of said votes (id.). Lastly, the District Court concluded that since the Texarkana Appeals Court refused to pass on the merits of the contest case, the decision of the District Court of Harrison County, Texas was the last State ruling on the issues therein, and that the doctrine of collateral estoppel came into play to estop the Defendants to deny or question the findings of fact and conclusions entered following the October 12, 1970 judgment (App. 22).

The basis of estoppel by judgment is that the parties have had their day in court (*Johannessen* v. *United States*, 225 U.S. 227, 238, 56 L. Ed. 1066, 1070). The cases generally speak of the finality of the judgment in considering questions of res judicata, but not conclusively so in considering questions of collateral estoppel. In *Zdanok* v. *Glidden Co., Durkee, Etc.*, 327 F.2d 944, 945, 955 (2d Cir. 1964), Judge Friendly well expressed the principle, thus:

> "Dealing with this very question of the kind of finality of judgment necessary to create an estoppel, we pointed out, quite recently, that collateral estoppel does not require a judgment 'which ends the litigation * * * and leaves nothing for the court to do but execute the judgment,' Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945), but includes many dispositions which, *though not final in that sense, have nevertheless been fully litigated.* Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2 Cir. 1961) cert. denied 368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1962), and cases cited. As we there said, '"Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again'." (emphasis supplied).

To suggest that after more than two months of trial the issues in the State election contest were not fully litigated is to reflect both upon counsel and the tribunal of trial. We urge that the District Court properly applied the doctrine of collateral estoppel against Ammerman.

"THE CLAIM THAT AMMERMAN'S COUNSEL STIPULATED ON JURISDICTION"

The suggestion that we have quoted counsel out of context on page 5 of our Petition prompts us to enlarge upon the quotation, as follows:

> (Mr. Huffman) "Our position would be that your restraining order prevents this case from becoming moot, that since the election is not going to be held on November 3rd, and no date for the election for County

Judge has been set, that this case will not become moot, and that they should go ahead and decide the case on the merits.

"* * *

(The Court) "Suppose the Court of Civil Appeals ignores this order? What power have I got over the Court of Civil Appeals to make them decide a case they don't want to decide?

(Mr. Huffman) "I don't know that this Court could make them decide the case on the merits. They have two alternatives.

"They could say 'We want to do justice, and we will decide the case between the parties or decide it on the merits, and we will either affirm or we will reverse and render judgment for Ammerman.'

"Now, if they do that, I don't anticipate any problem.

"Their other possibility is to say, 'Well, we don't care what Judge Justice has said. We are still going to dismiss it as moot.'

"I don't believe they would do that. I have no guarantee, but if they did, this Court still has control. You would have jurisdiction over when the election would be held and could determine then whose name should go on." (Hearing on Motion to Dissolve Preliminary Injunction, pp. 10-13).

CONCLUSION

The Circuit Court opinion contains an epilogue (App. 65). If that opinion be not corrected, we think a more suitable epilogue might be found in the resignation felt on the part of those electors who do not approve of ballot box stuffing. It may well be found in the poignant and pathetic remarks of an elderly Negro voter, who had her absentee ballot voted against her wishes. Listen to what Annie B. Coats said to one of the ballot box stuffing conspirators:

> "• • • I told him, I say, I ain't casting no vote, 'cause whomsoever they want they going to get them anyhow, and regardless of that vote." (Statement of Facts in the State Trial Court, p. 1190, in evidence in this case).

We reiterate that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Petitioners to Brief of Respondents was this the 10th day of January, 1973, placed in the United State Mail, postage prepaid, to Mr. William M. Huffman, P. O. Box M, Marshall, Texas 75670, and Mr. Austin C. Bray, Jr., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, Attorneys of Record for Respondents.

.....

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